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United States  
Circuit Court of Appeals

For the Ninth Circuit. *f*

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J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON,  
and FRED D. JACKSON,

Appellants,

vs.

FIRST NATIONAL TRUST AND SAVINGS BANK OF SANTA  
BARBARA, HORACE P. HOEFER, PETER DAVIDSON,  
CATHERINE DAVIDSON, and GEORGE GIOVANOLA,  
Trustee in Bankruptcy, of the Estate of Mortgage Securi-  
ties, Inc., of Santa Barbara, a Corporation, Bankrupt,

Appellees,

and

J. H. McCUNE, ALICE W. JACKSON, ALICE P. JACKSON,  
and FRED D. JACKSON,

Appellants,

vs.

THOMAS J. SMITHERAM, E. W. SQUIER, and J. F. GOUX,

Appellees.

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Transcript of Record

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Upon Appeals from the District Court of the  
United States for the Southern District  
of California, Central Division

FILED  
OCT 5 - 1939



**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

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and FRED D. JACKSON,

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**Upon Appeals from the District Court of the  
United States for the Southern District  
of California, Central Division**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

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222 La Arcada Building,  
Santa Barbara, Calif.

For Appellees First National Trust & Savings  
Bank of Santa Barbara, Horace P. Hoefler,  
Peter Davidson and Catherine Davidson:

HEANEY, PRICE, POSTEL & PARMA,  
JOHN WILLIAM HEANEY, Esq.,  
FRANCIS PRICE, Esq.,  
A. C. POSTEL, Esq.,  
HAROLD PARMA, Esq.,  
21 E. Canon Perdido Street,  
Santa Barbara, Calif.

For Appellee George Giovanola,

Trustee in Bankruptcy:

W. P. BUTCHER, Esq.,  
STANLEY T. TOMLINSON, Esq.,  
1010 State Street,  
Santa Barbara, Calif.

For Appellees Thomas J. Smitheram, E. W. Squier  
and J. F. Goux:

W. P. BUTCHER, Esq.,  
STANLEY T. TOMLINSON, Esq.,  
1010 State Street,  
Santa Barbara, Calif. [1\*]

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\*Page numbering appearing at the foot of page of original certified  
Transcript of Record.

In the District Court of the United States, Southern  
District of California, Central Division

No. 31965-C

In the Matter of

MORTGAGE SECURITIES INC. OF  
SANTA BARBARA, a corporation,  
Bankrupt.

### CITATION

United States of America—ss.

The President of the United States

To First National Trust and Savings Bank of  
Santa Barbara, Horace P. Hoefler, Peter  
Davidson, Catherine Davidson, and George  
Giovanola, Trustee in Bankruptcy, Greeting:

You, and each of you, are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, on the 5th day of September, 1939, pursuant to the appeal duly obtained and filed in the Clerk's office of the District Court of the United States for the Southern District of California, Central Division, wherein you are appellees and J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson, are the appellants, to show cause, if any there be, why the order and decree in said appeal mentioned should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf, and to do and receive that may appertain to justice to be done in the premises.

Witness, the Honorable Wm. P. James, United States Judge for the Southern District of California, Central Division [2] on the 26 day of July, 1939.

WM. P. JAMES

Judge of the above entitled Court.  
Signing in lieu of Judge Cosgrave who is absent from the District.

Receipt of a copy of the above "Citation" is hereby admitted this 31st day of July, 1939.

JOHN WILLIAM HEANEY

FRANCIS PRICE

A. C. POSTEL and

HAROLD PARMA

By WARNER EDMONDS, JR.

Attorneys for First National Trust & Savings Bank, Horace P. Hoefler, Peter Davidson and Catherine Davidson.

W. P. BUTCHER

Attorney for George Giovalona,  
Trustee in Bankruptcy.

[Endorsed]: Filed Aug. 2, 1939. [3]

[Title of District Court and Cause.]

CITATION

United States of America—ss.

The President of the United States

To Thomas J. Smitheram, E. W. Squier, and  
J. F. Goux, Greeting:

You, and each of you, are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, on the 5th day of September, 1939, pursuant to the appeal duly obtained and filed in the Clerk's office of the District Court of the United States for the Southern District of California, Central Division, wherein you are appellees and J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson, are the appellants, to show cause, if any there be, why the order and decree in said appeal mentioned should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf, and to do and receive that may appertain to justice to be done in the premises.

Witness, the Honorable Wm. P. James, United States Judge for the Southern District of California, Central Division, on the 26 day of July, 1939.

WM. P. JAMES

Judge of the above entitled Court.

Signing for Judge Cosgrave  
who is absent from the District.

Received a copy of the within "Citation" this 31st day of July, 1939.

W. P. BUTCHER

By S. T. T.

STANLEY T. TOMLINSON

Attorneys for Thos. J. Smith-  
eram, E. W. Squier, and  
J. F. Goux.

[Endorsed]: Filed Aug. 2, 1939. [6]

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[Title of District Court and Cause.]

PETITION

To the Honorable Judges of the District Court of  
the United States for the Southern District of  
California, Central Division:

The petition of First National Trust and Savings Bank of Santa Barbara, of Santa Barbara, California, Horace P. Hoefler, of Santa Barbara, California, and Peter Davidson and Catherine Davidson, husband and wife, of Santa Barbara, California, respectfully shows:

That Mortgage Securities Inc. of Santa Barbara, of the City of Santa Barbara, State of California, in said District, has for the six months next preceding the date of the filing of this petition had its principal place of business in the City of Santa Barbara, County of Santa Barbara, State of California, in said District; that the said Mortgage Securities Inc. of Santa Barbara is a corporation organized under the law of the State of California and that it is a monied and business corporation and

not a municipal, railroad, insurance or banking corporation, or building and loan association; that the said Mortgage Securities Inc. of Santa Barbara owes debts to the amount of \$1,000.00 and over and at all times mentioned herein was and is now insolvent; that your petitioners are creditors of said Mortgage Securities Inc. of Santa Barbara, having provable claims against it which amount in the aggregate, in excess of the value of securities held by them, to \$500.00. [8]

That your petitioner, First National Trust and Savings Bank of Santa Barbara, is the owner and holder of five (5) promissory notes of said Mortgage Securities Inc. of Santa Barbara as follows:

1. Promissory note of Mortgage Securities Inc. of Santa Barbara, dated May 29, 1931, payable to First National Trust and Savings Bank of Santa Barbara or Order on August 27, 1931, in the sum of \$10,000.00, with interest at the rate of 7% per annum.

2. Promissory note of Mortgage Securities Inc. of Santa Barbara, dated June 4, 1931, payable to First National Trust and Savings Bank of Santa Barbara or order on September 2, 1931, in the sum of \$10,000.00, with interest at the rate of 7% per annum.

3. Promissory note of Mortgage Securities Inc. of Santa Barbara, dated June 16, 1931, payable to First National Trust and Savings Bank of Santa Barbara or order on September 14, 1931, in the sum of \$10,000.00, with interest at the rate of 7% per annum.



4. Promissory note of Mortgage Securities Inc. of Santa Barbara, dated June 29, 1931, payable to First National Trust and Savings Bank of Santa Barbara or order on September 26, 1931, in the sum of \$15,000.00, with interest at the rate of 7% per annum.

5. Promissory note of Mortgage Securities Inc. of Santa Barbara, dated August 10, 1931, payable to First National Trust and Savings Bank of Santa Barbara or order on November 8, 1931, in the sum of \$5,000.00, with interest at the rate of 7% per annum.

That an action was commenced in the Superior Court of the State of California, in and for the County of Santa Barbara, on July 9, 1935, to recover the amount due on said notes; that said action is still pending and said notes have not been paid.

That your petitioners, Horace P. Hoefler, Peter Davidson and Catherine Davidson, are and each of them is a creditor of Mortgage Securities Inc. of Santa Barbara by reason of the following facts:

That at all times mentioned herein and prior to 1931 each of said petitioners was a stockholder of Mortgage Securities Inc. of Santa Barbara and as such stockholders were liable for the debts of said Mortgage Securities Inc. of Santa Barbara in the [9] proportion that the stock held by each bore to the whole of the subscribed capital stock of said Mortgage Securities Inc. of Santa Barbara; that

prior to the 15th day of October, 1936, certain creditors of Mortgage Securities Inc. of Santa Barbara made demand upon said petitioners, Horace P. Hoefler, Peter Davidson and Catherine Davidson for payment of each of said petitioner's indebtedness to said creditors by reason of such stockholders' liability; that on October 15, 1936, your petitioner, Horace P. Hoefler, paid to said creditors the sum of \$296.00 in satisfaction of his indebtedness to said creditors and by reason of such payment your petitioner, Horace P. Hoefler, has a provable claim against said Mortgage Securities Inc. of Santa Barbara in the sum of \$296.00, together with interest thereon from October 15, 1936; that said sum of \$296.00 has not been paid; that on the 15th day of December, 1936, your petitioners, Peter Davidson and Catherine Davidson, paid to said creditors the sum of \$555.00 in satisfaction of their indebtedness to said creditors and by reason of such payment your petitioners, Peter Davidson and Catherine Davidson, have a provable claim against said Mortgage Securities Inc. of Santa Barbara in the sum of \$555.00, together with interest thereon from December 15, 1936; that said sum of \$555.00 has not been paid.

That your petitioners hold no security for the payment of said claims.

That within four months next preceding the filing of this petition, the said Mortgage Securities Inc. of Santa Barbara, while insolvent, committed

an act of bankruptcy in that it suffered and permitted a creditor to obtain through legal proceedings a preference by way of attachment and did not vacate or discharge the same within thirty days from the date of such attachment; that said preference arises by reason of the following facts: [10]

That an action is now pending in the Superior Court of the State of California, in and for the County of Santa Barbara, entitled "G. Virginia Kaysser, Plaintiff, vs. Mortgage Securities Inc. of Santa Barbara, a corporation, Defendant", being Action No. 26699; that said action was instituted by the plaintiff therein to recover on promissory notes of said Mortgage Securities Inc. of Santa Barbara; that on the 7th day of January, 1938, J. H. McCune filed a complaint in intervention in said action alleging that he was the owner and holder of a claim against said Mortgage Securities Inc. of Santa Barbara in the sum of \$8,437.50; that said claim arose by reason of stockholders' liability payments theretofore made by Fred T. Jackson and Alice P. Jackson, stockholders of said Mortgage Securities Inc. of Santa Barbara; that said complaint in intervention further alleged that the said J. H. McCune is the assignee of any and all claims of said Fred T. Jackson and Alice P. Jackson against said Mortgage Securities Inc. of Santa Barbara by reason of said stockholders' liability payments; that said J. H. McCune did on January 7, 1938, cause two writs of attachment to be issued out of

said Superior Court in said action, one addressed to the Sheriff of the County of Ventura, and one addressed to the Sheriff of the County of Santa Barbara; that pursuant to said writ of attachment, the Sheriff of Ventura County levied upon all right, title and interest of said Mortgage Securities Inc. of Santa Barbara in and to several parcels of real property located in said Ventura County and standing of record in the name of Security Title Insurance and Guarantee Company, of Santa Barbara, California, and that said Sheriff did on January 12, 1938, record a copy of said writ and a notice of attachment in the Office of the County Recorder of Ventura County and on said day posted a copy of said writ and a notice of [11] attachment on each of said parcels of real property; that pursuant to said writ of attachment the Sheriff of Santa Barbara County did on the 10th day of January, 1938, levy upon all right, title and interest of Mortgage Securities Inc. of Santa Barbara in and to several parcels of real property located in the County of Santa Barbara, and did on said day record a copy of said writ and a notice of attachment in the office of the County Recorder of Santa Barbara County and posted a copy of said writ and a notice of attachment on each of said parcels of real property; that said Sheriff of Santa Barbara County did likewise on the 11th day of January, 1938, levy upon all moneys, credits, goods, effects, debts and

property due from Security Title Insurance and Guarantee Company to said Mortgage Securities Inc. of Santa Barbara by serving on said Security Title Insurance and Guarantee Company on the 11th day of January, 1938, a notice of garnishment.

That an action is now pending in the Superior Court of the State of California, in and for the County of Santa Barbara, entitled "G. Virginia Kaysser, Plaintiff, vs. Mortgage Securities Inc. of Santa Barbara, a corporation, Defendant", being Action No. 27038; that said action was instituted by the plaintiff therein to recover on certain promissory notes of said Mortgage Securities Inc. of Santa Barbara in the total sum of \$30,000.00, payable to County National Bank and Trust Company of Santa Barbara; that on the 7th day of January, 1938, J. H. McCune filed a complaint in intervention in said action alleging that he was the owner and holder of a claim in said Mortgage Securities Inc. of Santa Barbara in the sum of \$5,062.50; that said claim arose by reason of stockholders' liability payments theretofore made by Fred T. Jackson and Alice P. Jackson, stockholders of said Mortgage Securities Inc. of Santa Barbara; that said complaint in intervention further alleged that the said J. H. McCune is the assignee of any and all claims of said Fred T. Jackson and Alice P. Jackson against [12] said Mortgage Securities Inc. of Santa

Barbara by reason of said stockholders' liability payments; that on January 7, 1938, the said J. H. McCune and the said G. Virginia Kaysser, plaintiff in said action, caused writs of attachment to be issued out of said Superior Court in said action, two addressed to the Sheriff of the County of Ventura and two addressed to the Sheriff of the County of Santa Barbara; that pursuant to said writs of attachment, the Sheriff of Ventura County levied upon all right, title and interest of said Mortgage Securities Inc. of Santa Barbara in and to several parcels of real property located in said Ventura County and standing of record in the name of Security Title Insurance and Guarantee Company, of Santa Barbara, California, and said Sheriff did on January 12, 1938, record copies of said writs and notices of attachment in the office of the County Recorder of Ventura County and on said day posted copies of said writs and notices of attachment on each of said parcels of real property; that pursuant to said writs, the Sheriff of Santa Barbara County did on the 10th day of January, 1938, levy upon all right, title and interest of Mortgage Securities Inc. of Santa Barbara in and to several parcels of real property located in the County of Santa Barbara and did on said day record copies of said writs and notices of attachment in the office of the County Recorder of Santa Barbara County and posted copies of said writs and notices of attachment on each of said parcels of real property.

That at the time of the levying of said attachments, as aforesaid, the said Mortgage Securities Inc. of Santa Barbara had an interest in and to the real property so attached and in and to certain moneys, credits, goods, effects, debts and property due from the Security Title Insurance and Guarantee Company. [13]

That the attachments so levied have never been released, determined or vacated or discharged, but that ever since have and do now constitute subsisting liens upon the property of said Mortgage Securities Inc. of Santa Barbara, and that on May 10, 1938, said liens will become a preference not to be released or avoided by bankruptcy proceedings, and that said attached property will become and be finally disposed of and sequestered by said J. H. McCune and G. Virginia Kaysser and that your petitioners and the general creditors of said Mortgage Securities Inc. of Santa Barbara will be deprived of said property and of the value thereof.

Wherefore, your petitioners pray that service of this petition, with a subpoena, may be made upon Mortgage Securities Inc. of Santa Barbara, as provided by the bankruptcy laws of the United States of America, and that said Mortgage Securities Inc. of Santa Barbara may be adjudged bankrupt within the purview of such laws.

Dated: This 7th day of May, 1938.

FIRST NATIONAL TRUST  
AND SAVINGS BANK OF  
SANTA BARBARA,

By ROBERT E. LEWIS,

Vice President,

HORACE P. HOEFER,

PETER DAVIDSON,

CATHERINE DAVIDSON,

Petitioners.

JOHN WILLIAM HEANEY,

FRANCIS PRICE,

A. C. POSTEL

HAROLD A. PARMA,

Attorneys for Petitioners.

[14]

State of California,  
County of Santa Barbara,  
City of Santa Barbara—ss.

Robert E. Lewis, Vice President of the First National Trust and Savings Bank of Santa Barbara, one of the petitioning creditors mentioned in the foregoing petition, and duly authorized to make this oath on behalf of said petitioner, does hereby make solemn oath that the statements of fact contained in the foregoing petition are true.

ROBERT E. LEWIS.



Subscribed and sworn to before me, this 7th day of May, 1938.

[Seal]                    KATE ORD NELSON.

Notary Public in and for the County of Santa Barbara, State of California.

My Commission Expires February 5, 1941.

State of California,  
County of Santa Barbara,  
City of Santa Barbara—ss.

Horace P. Hoefler, one of the petitioning creditors mentioned in the foregoing petition, does hereby make solemn oath that the statements of fact contained in the foregoing petition are true.

HORACE P. HOEFER.

Subscribed and sworn to before me this 6th day of May, 1938.

[Seal]                    MARIAN A. JONES,

Notary Public in and for the County of Santa Barbara, State of California.

State of California,  
County of Santa Barbara,  
City of Santa Barbara—ss.

Peter Davidson and Catherine Davidson, two of the petitioning creditors mentioned in the foregoing petition, do hereby make solemn oath that the statements of fact contained in the foregoing petition are true.

PETER DAVIDSON,  
CATHERINE DAVIDSON.

Subscribed and sworn to before me, this 7th day of May, 1938.

[Seal]                      KATE ORD NELSON,  
Notary Public in and for the County of Santa Barbara, State of California.

My Commission Expires February 5, 1941.

[Endorsed]: Filed May 9, 1938. [15]

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[Title of District Court and Cause.]

ADJUDICATION AND ORDER OF  
REFERENCE.

At Los Angeles, in the said District, on the 1st day of June, A. D., 1938, before the Honorable Wm. P. James, Judge of said Court in Bankruptcy, the petition of First National Trust and Savings Bank of Santa Barbara; Horace P. Hoefler; and Peter Davidson and Catherine Davidson, husband and wife, that Mortgage Securities, Inc., of Santa Barbara, a corporation, be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said Mortgage Securities Inc., of Santa Barbara, a corporation, is hereby declared and adjudged a bankrupt accordingly.

It Is Therefore Ordered, that said matter be referred to Hugh J. Weldon, Esq., one of the Referees in Bankruptcy of the Court, to take such further proceedings therein as are required by said Acts;

and that the said Mortgage Securities Inc. of Santa Barbara, a corporation, shall attend before the said Referee on the 8th day of June, 1938, at Santa Barbara and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said Involuntary Bankruptcy.

Witness the Honorable Wm. P. James, Judge of the said Court, and the seal thereof, at Los Angeles in said District, on the 1st day of June, A. D., 1938.

[Seal of the Court]

R. S. ZIMMERMAN,

Clerk.

By H. K. JACOBS,

Deputy Clerk.

[Endorsed]: Filed June 1, 1938. [16]

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[Title of District Court and Cause.]

PETITION FOR ORDER VACATING ADJUDICATION FOR BANKRUPTCY.

Before the Honorable Judge Cosgrave, Judge of the Above Entitled Court:

This verified petition, presented and filed by and on behalf of J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, respectfully shows:

I.

Mortgage Securities Inc. of Santa Barbara, the above named bankrupt, is now, and at all times herein mentioned has been, a corporation, organized

and existing under and by virtue of the laws of the State of California, with its principal place of business in the City of Santa Barbara, County of Santa Barbara, State of California.

## II.

The County National Bank and Trust Company of Santa Barbara is now, and at all times herein mentioned has been, a national banking association, organized and existing under and by virtue of the laws of the United States of America, with its principal place of business in the City of Santa Barbara, County of Santa Barbara, State of California.

## III.

On or about the 12th day of March, 1931, in the said City of [17] Santa Barbara, the County National Bank and Trust Company of Santa Barbara loaned to Mortgage Securities Inc. of Santa Barbara, at its request, the sum of Fifteen Thousand Dollars (\$15,000.00) in cash. On or about the 8th day of June, 1931, the County National Bank and Trust Company of Santa Barbara loaned to Mortgage Securities Inc. of Santa Barbara, at its request, the sum of Five Thousand Dollars (\$5,000.00) in cash. On the 8th day of September, 1931, by reason of the said sum of Twenty Thousand Dollars (\$20,000.00) in cash loaned to Mortgage Securities Inc. of Santa Barbara as aforesaid, and to evidence the same, Mortgage Securities Inc. of Santa Barbara did make, execute, and deliver to the said

County National Bank and Trust Company of Santa Barbara its certain promissory note in words and figures as follows, to-wit:

\$20,000.00

On the 7th day of December, 1931, Mortgage Securities Inc. of Santa Barbara jointly and severally promises to pay to the order of County National Bank and Trust Company of Santa Barbara, at its office in Santa Barbara, California, Twenty Thousand and 00/100—— Dollars with interest at the rate of 7 per cent. per annum from date until paid, with costs of collection or an attorney's fee in case payment shall not be made at maturity.

Interest payable at maturity, and if not so paid, to thereafter bear the same rate of interest as the principal, and should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Payable only in United States Gold Coin, for value received. The makers and endorsers of this note hereby waive diligence, demand, protest and notice.

MORTGAGE SECURITIES INC.  
OF SANTA BARBARA

[Seal]

FRED D. JACKSON

President

D. W. MONTGOMERY

Secretary

Santa Barbara, California

Dated Sept. 8, 1931

Prior to the 13th day of January, 1938, the said County National Bank and Trust Company of Santa Barbara did set over and assign the said promissory note hereinabove set forth to G. Virginia [18] Kaysser for collection purposes. On the 13th day of January, 1938, by an instrument in writing, the said County National Bank and Trust Company of Santa Barbara and the said G. Virginia Kaysser did set over and assign the said promissory note to J. H. McCune. J. H. McCune is now, and ever since the said 13th day of January, 1938, has been, the owner and holder of the said promissory note and in possession thereof.

No part of the said debt has been paid by Mortgage Securities Inc. of Santa Barbara, or anyone whomsoever or at all, except that interest thereon was paid by the said Mortgage Securities Inc. of Santa Barbara in a total sum of Eleven Hundred Fifty-five Dollars and Thirty-eight Cents (\$1,155.38, which said sum of Eleven Hundred Fifty-five Dollars and Thirty-eight Cents (\$1,155.38) is represented by an interest payment of Three Hundred Fifty Dollars (\$350.00) made by Mortgage Securities Inc. of Santa Barbara on December 7, 1931, and an interest payment of Eight Hundred Five Dollars and Thirty-eight Cents (\$805.38) representing funds on deposit to the credit of Mortgage Securities Inc. of Santa Barbara at the County National Bank and Trust Company of Santa Barbara, which said amount of Eight Hundred Five Dollars and Thirty-eight Cents (\$805.38) was ap-

plied to the said indebtedness on or about October 18, 1934.

From the 16th day of December, 1936, to and including the 4th day of November, 1937, various stockholders of Mortgage Securities Inc. of Santa Barbara, by reason of their statutory stockholder's liability did pay to the said County National Bank and Trust Company of Santa Barbara and the said G. Virginia Kaysser a total sum of Eighteen Thousand Nine Hundred Sixty-nine Dollars and Seventy Cents (\$18,969.70), in satisfaction of such said stockholder's liability. The total amount of the present indebtedness of the said Mortgage Securities Inc. of Santa Barbara on the note obligation herein set forth is now the principal sum of Twenty Thousand Dollars (\$20,000.00), together with interest thereon from [19] September 8th, 1931, to date, at the rate of 7% per annum, less the total sum of Eleven Hundred Fifty-five Dollars and Thirty-eight Cents (\$1,155.38) heretofore paid as interest as hereinabove set forth.

On the 6th day of November, 1935, the said G. Virginia Kaysser, as assignee of the said promissory note, did file an action in the Superior Court of the State of California, in and for the County of Santa Barbara, against Mortgage Securities Inc. of Santa Barbara, praying judgment upon said promissory note, which said action is still pending in such said Superior Court.

## IV.

On or about the 14th day of May, 1931, in the said City of Santa Barbara, the County National Bank and Trust Company of Santa Barbara loaned to Mortgage Securities Inc. of Santa Barbara, at its request, the sum of Ten Thousand Dollars (\$10,000.00) in cash. On or about the 12th day of August, 1931, by reason of the said sum of Ten Thousand Dollars (\$10,000.00) loaned to Mortgage Securities Inc. of Santa Barbara as aforesaid, and to evidence the same, Mortgage Securities Inc. of Santa Barbara did make, execute, and deliver to the said County National Bank and Trust Company of Santa Barbara its certain promissory note in words and figures as follows, to-wit:

“\$10,000.00 On the 10th day of November, 1931, Mortgage Securities Inc. of Santa Barbara jointly and severally promise to pay to the order of County National Bank and Trust Company of Santa Barbara, at its office in Santa Barbara, California,

Ten Thousand and 00/100 Dollars  
with interest at the rate of seven per cent. per annum from date until paid, with costs of collection or an attorney's fee in case payment shall not be made at maturity.

Interest payable at maturity, and if not so paid, to thereafter bear the same rate of interest as the principal and should the interest not be paid when due, then the whole sum of prin-



cipal and interest shall become immediately due and payable at the option of the holder of this note. Payable only in United States Gold Coin, for value received. The makers and endorsers of this note hereby waive diligence, demand, protest and notice. [20]

MORTGAGE SECURITIES INC.  
OF SANTA BARBARA

[Seal] FRED D. JACKSON

President

D. W. MONTGOMERY

Secretary

Santa Barbara, California

Dated August 12, 1931

Prior to the 13th day of January, 1938, the said County National Bank and Trust Company of Santa Barbara did set over and assign the said promissory note to G. Virginia Kaysser for collection purposes. On the 13th day of January, 1938, by an instrument in writing, the said County National Bank and Trust Company of Santa Barbara and the said G. Virginia Kaysser did set over and assign the said promissory note to J. H. McCune. J. H. McCune is now, and ever since the said 13th day of January, 1938, has been, the owner and holder of the said promissory note and in possession thereof.

No part of the said debt has been paid by Mortgage Securities Inc. of Santa Barbara, or anyone

whomsoever or at all, except that interest thereon has been paid to November 10th, 1931. The total amount of the present indebtedness of the said Mortgage Securities Inc. of Santa Barbara on the said note obligation upon just hereinabove set forth is now the principal sum of Ten Thousand Dollars (\$10,000.00), together with interest thereon from November 1st, 1931, to date, at the rate of seven (7%) per cent per annum.

On the 6th day of November, 1935, the said G. Virginia Kaysser, as assignee of the said promissory note, did file an action in the Superior Court of the State of California, in and for the County of Santa Barbara, against Mortgage Securities Inc. of Santa Barbara, praying judgment upon said promissory note, which said action is still pending in such said Superior Court.

## V

On or about the 28th day of June, 1927, in the said City of Santa Barbara, Winsor Soule loaned to Mortgage Securities Inc. [21] of Santa Barbara, at its request, the sum of Five Thousand Dollars (\$5,000.00) in cash. On the first day of November, 1931, by reason of the said sum of Five Thousand Dollars (\$5,000.00) in cash loaned to Mortgage Securities Inc. of Santa Barbara as aforesaid, and to evidence the same, Mortgage Securities Inc. of Santa Barbara did make, execute, and deliver to

the said Winsor Soule its certain promissory note in words and figures as follows, to-wit:

“\$5,000.00

Santa Barbara, California,

November 1, 1931

On demand, for value received, Mortgage Securities Inc., of Santa Barbara promise to pay to Winsor Soule, or order, at Santa Barbara, California the sum of Five Thousand and 00/100—Dollars (\$5,000.00), with interest thereon from date until paid at the rate of seven per cent per annum, said interest payable Dec, Mar, June, Sept., and both principal and interest payable only in current lawful money of the United States. And in case payment of this note, or any portion thereof, shall not be made at maturity, and suit be brought to enforce collection thereof, further agree to pay the additional sum of           dollars in like lawful money, as and for an attorney's fee.

MORTGAGE SECURITIES INC.  
OF SANTA BARBARA  
FRED D. JACKSON

President

ALICE W. JACKSON

Assistant Secretary”

On or about the 10th day of October, 1934, in the City of Santa Barbara, County of Santa Barbara, State of California, the said Winsor Soule did en-

dorse said promissory note hereinabove described by writing on the back thereof the following words:

“Without recourse pay to the order of.....”, and appending his signature thereto.

At such time and place, for a good and valuable consideration, the said Winsor Soule did deliver the said promissory note just hereinabove set out, together with the endorsement on the back thereof just above described, to Alice W. Jackson. The said promissory note, together with the endorsement thereof, has, since the said 10th day of October, 1934, at all times remained, and now is, [22] in the possession of the said Alice W. Jackson.

No part of the said debt has been paid by Mortgage Securities Inc. of Santa Barbara, or anyone whomsoever or at all. The total amount of the present indebtedness of the said Mortgage Securities Inc. of Santa Barbara on the said note obligation is now the principal sum of Five Thousand Dollars (\$5,000.00), together with interest thereon from November 1st, 1931, to date, at the rate of seven (7%) per cent per annum.

On the 13th day of October, 1934, the said Alice W. Jackson did file an action in the Superior Court of the State of California in and for the County of Santa Barbara against Mortgage Securities Inc. of Santa Barbara, a corporation, praying judgment against the said Mortgage Securities Inc. of Santa Barbara upon the said promissory note in the principal sum of Five Thousand Dollars (\$5,000.00),

together with interest thereon from the first day of November, 1931. This action is still pending in the said Superior Court of the State of California in and for the County of Santa Barbara.

## VI

At all times herein mentioned, the whole amount of the subscribed and issued capital stock of Mortgage Securities Inc. of Santa Barbara, a corporation, was represented by, and consisted of, four thousand four shares (4,004). At all times herein mentioned Fred D. Jackson and Alice P. Jackson have been, and are now, stockholders of Mortgage Securities Inc. of Santa Barbara, a corporation, and now own and hold shares of stock of the said Mortgage Securities Inc. of Santa Barbara, a corporation, as follows, to-wit:

Preferred Stock—492 $\frac{1}{2}$  shares

Common Stock—450 shares

On or about the 10th day of May, 1938, an involuntary petition in bankruptcy against Mortgage Securities Inc. of Santa [23] Barbara, a corporation, was filed in the within action by First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefler, Peter Davidson, and Catherine Davidson. A true copy of such said petition is attached hereto marked Exhibit "A", being hereby incorporated herein to the same force and effect as if set out here in its exact words and figures. On the 1st day of June, 1938, purportedly after service

of subpoena on Mortgage Securities Inc. of Santa Barbara, a corporation, and after the failure of the said Mortgage Securities Inc. of Santa Barbara to appear in answer to said involuntary petition in bankruptcy and the subpoena issued thereon the above entitled Court did make and enter its order of adjudication herein, declaring and adjudicating the said Mortgage Securities Inc. of Santa Barbara, a corporation, a bankrupt. A true and correct copy of such said order of adjudication is attached hereto marked Exhibit "B", being hereby incorporated herein to the same force and effect as if set out here in its exact words and figures.

### VIII

Under the said order of adjudication in bankruptcy hereinabove mentioned and set out as Exhibit "B" hereof, the said bankruptcy matter was referred to Hugh J. Weldon, one of the Referees in Bankruptcy, whose office is at 15 West Carrillo Street, Santa Barbara, California. Subsequent to the said order of adjudication and reference, the said Hugh J. Weldon, Referee in Bankruptcy, did purportedly call a meeting of creditors of Mortgage Securities Inc. of Santa Barbara, the purported bankrupt, and George Giovanola was purportedly elected and appointed Trustee in Bankruptcy, of the estate of Mortgage Securities Inc. of Santa Barbara. The said Hugh J. Weldon and George Giovanola, ever since such said time have

acted, or purported to act, as the Referee in Bankruptcy, and the Trustee in Bankruptcy, respectively, in the within matter.

## IX

The petition in involuntary bankruptcy filed herein as [24] aforesaid, a copy thereof being attached hereto as Exhibit "A", alleges that the First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefler, Peter Davidson, and Catherine Davidson, the petitioners therein, have provable claims against Mortgage Securities Inc. of Santa Barbara which amount in aggregate to a sum in excess of Five Hundred Dollars (\$500.00) over and above any securities held by them.

The claim of the First National Trust and Savings Bank of Santa Barbara, as alleged in said petition in involuntary bankruptcy, is founded upon certain money loaned to Mortgage Securities Inc. of Santa Barbara as evidenced by certain promissory notes described therein. Prior to the filing of the said involuntary petition in bankruptcy, however, such said promissory notes, together with the consideration upon which they were based, were set over and assigned by the said First National Trust and Savings Bank of Santa Barbara to G. Virginia Kaysser. On the 9th day of July, 193 , the said G. Virginia Kaysser did institute an action in the Superior Court of the State of California, in and for the County of Santa Barbara, against Mortgage Securities Inc. of Santa Barbara upon said

promissory notes, and for judgment upon the amount due thereon, which said action is still pending in the said Superior Court of the State of California, in and for the County of Santa Barbara. The petitioners herein are informed and believe, and upon such information and belief allege, that at the time of the filing of the said involuntary petition in bankruptcy, and ever since such said time, the said First National Trust and Savings Bank of Santa Barbara did not have, and do not now have, any claim whatsoever against the said Mortgage Securities Inc. of Santa Barbara all of such said claims and promissory notes having theretofore been set over and assigned to G. Virginia Kaysser, who was at such said time, and ever since has been, the owner and holder thereof.

With respect to the purported claim of Horace P. Hoefer [25] against Mortgage Securities Inc. of Santa Barbara, as set forth in the said involuntary petition in bankruptcy, such said involuntary petition in bankruptcy alleges that the, said Horace P. Hoefer was at all times therein mentioned and prior to 1931 a stockholder of Mortgage Securities Inc. of Santa Barbara, and as such stockholder was liable for the debts of said Mortgage Securities Inc. of Santa Barbara in the proportion that the stock held by the said Horace P. Hoefer bore to the whole of the subscribed capital stock of Mortgage Securities Inc. of Santa Barbara. The said petition in involuntary bankruptcy alleges that the said Horace P. Hoefer did, on October 15th,



1936, by reason of a demand from certain creditors of Mortgage Securities Inc. of Santa Barbara, pay to such said creditors the sum of Two Hundred Ninety-Six Dollars (\$296.00) in satisfaction of his proportionate stockholders' liability to such said creditors and as payment of a proportionate share of such said creditors' claims against Mortgage Securities Inc. of Santa Barbara. The said petition in involuntary bankruptcy further alleges that by reason of such said payment, the said Horace P. Hoefler has a provable claim in the sum of Two Hundred Ninety-Six Dollars (\$296.00) against Mortgage Securities Inc. of Santa Barbara.

It appears from the facts and allegations set forth in the said involuntary petition in bankruptcy, and from the face thereof, that the said Horace P. Hoefler at the time stated was, together with others, a stockholder of Mortgage Securities Inc. of Santa Barbara and liable as such stockholder for the proportionate payment of the debts of Mortgage Securities Inc. of Santa Barbara in the proportion that the stock held by the said Horace P. Hoefler bore to the whole of the subscribed capital stock of Mortgage Securities Inc. of Santa Barbara. It further appears from the facts and allegations set forth in the said involuntary petition in bankruptcy, and from the face thereof, that the purported claim of Horace P. Hoefler, alleged to be a provable creditor's claim against Mortgage Securities [26] Inc. of Santa Barbara, is predicated and founded on the

fact that as such stockholder, the said Horace P. Hoefler paid a proportionate share of certain creditors' claims against Mortgage Securities Inc. of Santa Barbara, and thereupon become subrogated to the extent of such payment to the creditors' claims against the Mortgage Securities Inc. of Santa Barbara.

The true facts in connection with the purported provable claim of Horace P. Hoefler against Mortgage Securities Inc. of Santa Barbara, as set forth in the petition in involuntary bankruptcy, are as follows. At all times herein mentioned the said Horace P. Hoefler was a stockholder of Mortgage Securities Inc. of Santa Barbara and owned and held and had subscribed to and for eight shares of the capital stock of Mortgage Securities Inc. of Santa Barbara. The First National Trust and Savings Bank of Santa Barbara and the County National Bank and Trust Company of Santa Barbara were creditors of Mortgage Securities Inc. of Santa Barbara by reason of money loaned to Mortgage Securities Inc. of Santa Barbara as set forth in Paragraph II, IV, and IX above. The said First National Trust and Savings Bank of Santa Barbara and the said County National Bank and Trust Company of Santa Barbara, for the purpose of enforcing their rights against the stockholders of Mortgage Securities Inc. of Santa Barbara, including the said Horace P. Hoefler, assigned their respective creditors' claims to G. Virginia Kaysser.

The said G. Virginia Kaysser thereupon commenced an action in the Justice's Court of the Second Judicial Township, County of Santa Barbara, State of California, against various stockholders of Mortgage Securities Inc. of Santa Barbara, including the said Horace P. Hoefer, to collect from such said stockholders the amount of their proportionate liability for payment of a proportionate amount of such said claims. The said Horace P. Hoefer thereupon paid to the said First National Trust and Savings Bank of Santa Barbara and the said County National Bank and Trust Company of Santa Barbara and the said G. Virginia Kaysser the said sum [27] of Two Hundred Ninety-Six Dollars (\$296.00) in payment of his liability as a stockholder of Mortgage Securities Inc. of Santa Barbara for the proportionate payment by him of such said creditors' claims, one of which claims being the claim of the First National Trust and Savings Bank of Santa Barbara as heretofore assigned to G. Virginia Kaysser as hereinabove set forth, and being the claim set forth in the involuntary petition in bankruptcy on file herein.

The said purported provable claim of Horace P. Hoefer, as appears from the facts hereinabove set forth, and as appears from the facts and allegations of the said involuntary petition in bankruptcy, and on the face thereof, is not, and never was, a direct claim against Mortgage Securities Inc. of Santa Barbara, but was, and is, solely advanced and

presented as, and arises solely from, the purported right of the said Horace P. Hoefler to be partially subrogated to the claims of the said First National Trust and Savings Bank of Santa Barbara and the said County National Bank and Trust Company of Santa Barbara, as assigned to the said G. Virginia Kaysser, against Mortgage Securities Inc. of Santa Barbara to the extent of Two Hundred Ninety-Six Dollars (\$296.00), being the amount paid by the said Horace P. Hoefler in payment for discharge of such said stockholders' liability for the proportionate payment of such said claims.

With respect to the purported claim of Peter Davidson and Catherine Davidson against Mortgage Securities Inc. of Santa Barbara, as set forth in the said involuntary petition in bankruptcy, such said involuntary petition in bankruptcy alleges that the said Peter Davidson and Catherine Davidson were at all times therein mentioned and prior to 1931 stockholders of Mortgage Securities Inc. of Santa Barbara, and as such stockholders were liable for the debts of said Mortgage Securities Inc. of Santa Barbara in the proportion that the stock held by the said Peter Davidson and Catherine Davidson bore to the whole of the subscribed capital stock of [28] Mortgage Securities Inc. of Santa Barbara. The said petition in involuntary bankruptcy alleges that the said Peter Davidson and Catherine Davidson did, on October 15th, 1936, by reason of a demand from certain creditors of Mortgage Securities

Inc. of Santa Barbara, pay to such said creditors the sum of Five Hundred Fifty-Five Dollars (\$555.00) in satisfaction of their proportionate stockholders' liability to such said creditors and as payment of a proportionate share of such said creditors' claims against Mortgage Securities Inc. of Santa Barbara. The said petition in involuntary bankruptcy further alleges that by reason of such said payment, the said Peter Davidson and Catherine Davidson have a provable claim in the sum of Five Hundred Fifty-Five Dollars (\$555.00) against Mortgage Securities Inc. of Santa Barbara.

It appears from the facts and allegations set forth in the said involuntary petition in bankruptcy, and from the face thereof, that the said Peter Davidson and Catherine Davidson at the time stated were, together with others, stockholders of Mortgage Securities Inc. of Santa Barbara and liable as such stockholders for the proportionate payment of the debts of Mortgage Securities Inc. of Santa Barbara in the proportion that the stock held by the said Peter Davidson and Catherine Davidson bore to the whole of the subscribed capital stock of Mortgage Securities Inc. of Santa Barbara. It further appears from the facts and allegations set forth in the said involuntary petition in bankruptcy, and from the face thereof, that the purported claim of Peter Davidson and Catherine Davidson, alleged to be a provable creditors' claim against Mortgage Securities Inc. of Santa Barbara, is predicated and

founded on the fact that as such stockholders, the said Peter Davidson and Catherine Davidson paid a proportionate share of certain creditors' claims against Mortgage Securities Inc. of Santa Barbara, and thereupon become subrogated to the extent of such payment to the creditors' claims against the Mortgage Securities Inc. of Santa Barbara. [29]

The true facts in connection with the purported provable claim of Peter Davidson and Catherine Davidson against Mortgage Securities Inc. of Santa Barbara, as set forth in the petition in involuntary bankruptcy, are as follows. At all times herein mentioned the said Peter Davidson and Catherine Davidson were stockholders of Mortgage Securities Inc. of Santa Barbara and owned and held and had subscribed to and for.....shares of the capital stock of Mortgage Securities Inc. of Santa Barbara. The First National Trust and Savings Bank of Santa Barbara and the County National Bank and Trust Company of Santa Barbara were creditors of Mortgage Securities Inc. of Santa Barbara by reason of money loaned to Mortgage Securities Inc. of Santa Barbara as set forth in Paragraphs III, IV, and IX above. The said First National Trust and Savings Bank of Santa Barbara and the said County National Bank and Trust Company of Santa Barbara, for the purpose of enforcing their rights against the stockholders of Mortgage Securities Inc. of Santa Barbara, including the said Peter Davidson and Catherine Davidson, assigned

their respective creditors' claims to G. Virginia Kaysser. The said G. Virginia Kaysser thereupon commenced an action in the Justice's Court of the Second Judicial Township, County of Santa Barbara, State of California, against various stockholders of Mortgage Securities Inc. of Santa Barbara, including the said Peter Davidson and Catherine Davidson to collect from such said stockholders the amount of their proportionate liability for payment of a proportionate amount of such said claims. The said Peter Davidson and Catherine Davidson thereupon paid to the said First National Trust and Savings Bank of Santa Barbara and the said County National Bank and Trust Company of Santa Barbara and the said G. Virginia Kaysser the said sum of Five Hundred Fifty-Five Dollars (\$555.00) in payment of their liability as stockholders of Mortgage Securities Inc. of Santa Barbara for the proportionate payment of and by them of such said creditors' claims, one of which [30] claims being the claim of the First National Trust and Savings Bank of Santa Barbara as heretofore assigned to G. Virginia Kaysser as hereinabove set forth, and being the claim set forth in the involuntary petition in bankruptcy on file herein.

The said purported provable claim of Peter Davidson and Catherine Davidson, as appears from the facts hereinabove set forth, and as appears from the facts and allegations of the said involuntary petition in bankruptcy, and on the face thereof, is

now, and never was, a direct claim against Mortgage Securities Inc. of Santa Barbara, but was, and is, solely advanced and presented as, and arises solely from, the purported right of the said Peter Davidson and Catherine Davidson to be partially subrogated to the claims of the said First National Trust and Savings Bank of Santa Barbara and the said County National Bank and Trust Company of Santa Barbara, as assigned to the said G. Virginia Kaysser, against Mortgage Securities Inc. of Santa Barbara to the extent of Five Hundred Fifty-Five Dollars (\$555.00), being the amount paid by the said Peter Davidson and Catherine Davidson in payment for discharge of such said stockholders' liability for the proportionate payment of such said claim.

### X

Prior to the filing of the involuntary petition in bankruptcy herein, or at any time whatsoever or at all, the said Horace P. Hoefer and the said Peter Davidson and the said Catherine Davidson, or any or either of them, did not request or demand in any manner whatsoever or at all, individually or collectively, that the said First National Trust and Savings Bank of Santa Barbara and the County National Bank and Trust Company of Santa Barbara and the said G. Virginia Kaysser, or any or either of them, proceed, or take any proceedings or actions, or file any petition in bankruptcy, against Mortgage Securities Inc. of Santa Barbara to en-



force [31] payment of the claim of the said First National Trust and Savings Bank of Santa Barbara and the said County National Bank and Trust Company of Santa Barbara and the said G. Virginia Kaysser, or either or any of such said claims, to a portion of which claims the said Horace P. Hoefer and Peter Davidson and Catherine Davidson claim to have been subrogated as set forth above. Prior to the filing of the involuntary petition in bankruptcy herein, the said G. Virginia Kaysser, as assignee of the said County National Bank and Trust Company of Santa Barbara had instituted an action in the Superior Court of the State of California in and for the County of Santa Barbara for the purpose of enforcing payment of such said claim, which said action is still pending. Prior to the filing of the said involuntary petition in bankruptcy, the said G. Virginia Kaysser, as assignee of the said First National Trust and Savings Bank of Santa Barbara, had instituted an action in the Superior Court of the State of California in and for the County of Santa Barbara for the purpose of enforcing payment of such said claim, which said action is still pending.

## XI

That by reason of all the facts and circumstances hereinabove set forth, and by reason of the facts and circumstances appearing in and on the face of the said involuntary petition in bankruptcy on file herein, the said First National Trust and Savings

Bank of Santa Barbara, the said Horace P. Hoefler, and the said Peter Davidson, and the said Catherine Davidson, or any or either of them, did not at any time or at all, and in particular did not at the time of the filing of the said involuntary petition in bankruptcy, have provable claims against the said Mortgage Securities Inc. of Santa Barbara, which said fact appears not only from the facts and allegations herein set forth but from the facts and allegations set forth in the said involuntary petition in bankruptcy. By reason of such said facts and allegations, and by [32] reason of the fact that such said parties, or any or either of them, did not have a provable claim against Mortgage Securities Inc. of Santa Barbara, the within Court did not at the time of the filing of the said involuntary petition in bankruptcy, and has not at any time since, had or acquired any jurisdiction whatsoever or at all to declare and adjudge Mortgage Securities Inc. of Santa Barbara, a corporation, bankrupt.

## XII

Subsequent to the reference of the said bankruptcy matter to Hugh J. Weldon, Referee in Bankruptcy, as aforesaid, a purported first meeting of creditors was held on the first day of July, 1938, at which meeting the said George Giovanola was purportedly elected Trustee of the estate of the said bankrupt.

Subsequent to the said first day of July, 1938, no meeting of creditors and no other proceedings

whatsoever were had in the said bankruptcy matter until the second day of February, 1939, on which date, the said Referee did purportedly hold an adjourned creditors' meeting for the purpose of examining witnesses. The petitioners herein, through their attorney, appeared at such meeting and presented objections to the holding of such meeting and to any further proceedings in the bankruptcy matter whatsoever on the ground that the involuntary petition in bankruptcy on file herein is insufficient on its face to give the within Court jurisdiction to make the purported adjudication in bankruptcy, and upon the ground that the within Court, or the said Referee, had no jurisdiction over the proceeding. Upon hearing such objections, the Referee overruled the same and proceeded with such purported meeting.

A subsequent meeting was called by the said Referee on the 21st day of February, 1939, at which time the petitioners again appeared and presented the same objections to such said hearing, which objections were again overruled. At both of such meetings the petitioners stated to, and notified, the said Referee in Bankruptcy [33] that a petition would be prepared and presented to the within Court asking for the relief hereinafter prayed.

The trustee in Bankruptcy has not at any time taken possession of, or had in his possession, any assets of the alleged bankrupt.

## XIII

At the time of the service of subpoena upon the alleged bankrupt herein by service thereof upon its officers, the officers of such said corporation did not notify the directors, stockholders, or creditors of the said bankrupt, or any or either of them, of such said bankruptcy proceedings, and did allow such said purported adjudication in bankruptcy to be made without opposing such said petition and without notifying the directors, stockholders, or creditors of such said bankrupt of such said proceedings.

Upon the first occasion presented after obtaining knowledge of the facts and circumstances involved in such said bankrupt proceedings and of the form and contents of such said involuntary petition in bankruptcy, such occasion being the said purported creditors' meeting held on the second day of February, 1939, the petitioners herein presented their objections to the jurisdiction of the within Court as hereinabove set forth, and ever since such time have objected on each occasion to the jurisdiction of the said Court.

The petitioners had no knowledge of the form or contents of the said involuntary petition in bankruptcy until approximately eight months after the filing of the same, during all of which time no proceedings were had in the bankruptcy matter except as hereinabove set forth. Upon obtaining such knowledge, the petitioners, through T. H. Canfield,

their attorney at that time, carefully investigated the matter of the said involuntary petition in bankruptcy and the adjudication based thereon, the said T. H. Canfield, [34] as attorney for the petitioners, devoting all his available time thereto, being engaged also in other litigation which required a considerable portion of his time. It was deemed advisable to carefully brief the law involved in the instant proceedings before presenting the matter to the within Court, so that the position of the petitioners could be clearly presented to the Court. In the interim, however, the position of the petitioners was presented to the within Court, before the said Hugh J. Weldon, Referee, by way of the objections made to the jurisdiction of the within Court at the hearings before the said Referee as hereinabove related.

The firm of Daily and Gallaudet, Attorneys, have at this time been associated with the said T. H. Canfield, as attorneys for the petitioners.

Wherefore, petitioners pray that they be allowed to appear in within proceedings; that the above entitled Court make and enter its order vacating and setting aside the said adjudication in bankruptcy heretofore made in the within matter against Mortgage Securities Inc. of Santa Barbara upon and at the time of the filing of the said involuntary petition in bankruptcy, and that the above entitled Court make and enter its order dismissing the said

involuntary petition in bankruptcy and all proceedings subsequent thereto.

T. H. CANFIELD

EDWARD GALLAUDET

Attorneys for J. H. McCune,  
Alice W. Jackson, Fred D. Jackson  
and Alice P. Jackson, Petitioners

(Verified April 19, 1939, by J. H. McCune) [35]

NOTE

Exhibit A, being the original petition in involuntary bankruptcy, is deleted, as such petition is included elsewhere in the record. [Set out at page 5.]

Exhibit B, being the original adjudication in bankruptcy, is deleted, as such adjudication is included elsewhere in the record. [Set out at page 16.]

[Endorsed]: Filed Apr. 20, 1939. [36]

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[Title of District Court and Cause.]

PETITION OF INTERVENING CREDITORS

To the Honorable Judge G. Cosgrave, Judge of the  
above-entitled Court:

This verified petition presented and filed by and on behalf of Thomas J. Smitheram, E. W. Squier and J. F. Goux respectfully shows:

## I.

That the Mortgage Securities Inc. of Santa Barbara, the above named bankrupt, is now and at all times herein mentioned has been a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of California, and having had its principal place of business in the City of Santa Barbara, County of Santa Barbara, State of California.

## II.

That on or about the 10th day of May, 1938, an involuntary petition in bankruptcy against said Mortgage Securities Inc. of Santa Barbara, a corporation, was filed with the Clerk of the above named Court by the First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefler, Peter [38] Davidson and Catherine Davidson, to which petition now on file herein reference is hereby had and the same is made a part hereof;

## II.

That on the said 1st day of June, 1938, the above named Court did duly and regularly make its order of adjudication herein declaring and adjudicating the said Mortgage Securities Inc. of Santa Barbara, a corporation, bankrupt to which order reference is hereby had and the same is made a part hereof; that under said order of adjudication said bankruptcy matter was referred to Hugh J. Weldon, one of the Referees in bankruptcy whose office is at

Number 15 West Carrillo Street, Santa Barbara, California, and thereafter at a meeting of the creditors of said bankrupt, duly and regularly called by the said Referee, George Giovanola, was elected and appointed Trustee in bankruptcy of the estate of said bankrupt and thereupon became the duly elected, appointed, qualified and acting trustee in bankruptcy of said estate.

### III.

That your petitioners, E. W. Squier and J. F. Goux, of Santa Barbara, on the 8th day of July, 1938, filed a proof of unsecured debt and claim with said Referee, Hugh J. Weldon, for the sum of \$3,-550.00 claiming and alleging that the said bankrupt was at and before the filing of said petition and still is justly and truly indebted to the said E. W. Squier and J. F. Goux, in said sum for legal services rendered and performed by the said last mentioned petitioners, a copy of which claim is hereunto annexed, marked Exhibit "A" to which reference is hereby had and the same is made a part hereof; that said claim was and is a provable claim in bankruptcy. [39]

### IV.

That your petitioner, Thomas J. Smitheram, on the 15th day of September, 1938, filed a proof of unsecured debt or claim against the said Mortgage Securities Inc. of Santa Barbara, with the said Hugh J. Weldon, Referee in Bankruptcy, in the



sum of \$433.00 in which said Thomas J. Smitheram claimed and alleged that said bankrupt was and is indebted to said claimant, Thomas J. Smitheram, in said sum for money deposited with the bankrupt as is more fully set forth in said proof of claim a copy of which is hereunto annexed, marked Exhibit "B" to which reference is hereby had and the same is made a part hereof.

#### V.

That on or about the 20th day of April, 1939, J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, filed a petition for an order vacating adjudication for bankruptcy in which the said petitioners last mentioned alleged and claimed that the creditors namely: Horace P. Hoefer, Peter Davidson and Catherine Davidson, said First National Trust and Savings Bank of Santa Barbara, did not have provable claims against the Mortgage Securities Inc. of Santa Barbara, and praying that said order of adjudication and the proceedings thereafter be dismissed; reference is hereby had to said petition for further particulars.

#### VI.

That your petitioners herein at the time of the filing of said petition in bankruptcy, prior thereto, and ever since have had and now have provable claims in bankruptcy against said Mortgage Securities Inc. of Santa Barbara, and at all said times were and still are qualified and competent to pe-

tition for the adjudication in bankruptcy of said bankrupt. [40]

## VII.

That the hearing of said petition for order vacating adjudication for bankruptcy has not been heard or determined and that the hearing thereof has been set by order of the above named Court on the 29th day of May, 1939, at the hour of ten o'clock A. M. of said day.

Wherefore, your petitioners pray that they and each of them may be joined as intervening petitioning creditors for the adjudication of said Mortgage Securities Inc. of Santa Barbara as a bankrupt to supplement the creditors named in said original petition in bankruptcy and that said petition to vacate said adjudication be denied.

E. W. SQUIER

THOMAS J. SMITHERAM

J. F. GOUX

Petitioners

STANLEY T. TOMLINSON

W. P. BUTCHER

Attorneys for Petitioners

[41]

State of California

County of Santa Barbara—ss:

E. W. Squier, being first duly sworn, deposes and says: That he is one of the petitioners in the foregoing Petition of Intervening Creditors; that

he has read the same and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

E. W. SQUIER

Subscribed and sworn to before me this 23rd day of May, 1939.

[Seal] J. E. DELWICHE

Notary Public in and for the County of Santa Barbara, State of California. [42]

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EXHIBIT "A"

[Title of District Court and Cause.]

Proof of Unsecured Debt

At Santa Barbara, in said Southern District of California, Central Division, on the 8th day of July, 1938, came E. W. Squier and J. F. Goux of Santa Barbara, in the County of Santa Barbara, in said Southern District of California, Central Division, and made oath and say: That Mortgage Securities, Inc., of Santa Barbara, a California corporation, against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said deponents in the sum of Three Thousand Five Hundred and Fifty Dollars (\$3,550.00).

That the nature and consideration of said debt is as follows:

That on the 4th day of February, 1934, the action of L. P. Feldmeier, J. C. Fast, H. Henry Ziegler, George N. Thomas and Orray Taft, plaintiffs, vs. Mortgage Securities, Incorporated of Santa Barbara, a corporation, Security Title Insurance and Guarantee Company, a corporation, Gertrude Adlerly et al, defendants, No. 25135, was commenced in the Superior Court of the State of California, in and for the County of Santa Barbara, and said action at all times since has continued to be [43] and now remains a pending action; that shortly upon and after the commencement of the above entitled action said Mortgage Securities Inc. of Santa Barbara, a corporation, employed and hired E. W. Squier and J. F. Goux, at all times herein mentioned attorneys at law duly licensed and qualified to practice in all of the court of the State of California, to represent said corporation as its attorneys in said action, and to serve and act as the attorneys of said corporation in said action for which said Mortgage Securities Inc. of Santa Barbara promised and agreed and obligated itself to pay said E. W. Squier and said J. F. Goux reasonable attorneys' fees for services by them to be rendered as such attorneys of said corporation; that said attorneys after said corporation had been duly served with summons in the above-entitled action, appeared for said corporation in said action and have at all times since represented said corporation in said action and have been the only attorneys representing said corporation in said action and acting as the

attorneys of said corporation in said action; that said attorneys for and on behalf of said corporation prepared, served and filed for and on behalf of said corporation numerous, lengthy and complicated pleadings for and on behalf of said corporation and in the defense and protection and assertion of its rights and properties in said action; that the trial of said action held in the Superior Court of the State of California, in and for the County of Santa Barbara, commenced on December 3, 1935, and was held thereafter from time to time throughout the course of more than twenty-three months during which said E. W. Squier and said J. F. Goux were in actual attendance at the trial of the above-entitled action as the attorneys of and for and representing said Mortgage Securities, Inc. of Santa Barbara for more than thirty days of time; that [44] the said action involved the question of validity of all mortgage certificates issued by said Mortgage Securities, Inc. of Santa Barbara and further involved the question of the character and sufficiency of the securities which the aforementioned Security Title Insurance and Guarantee Company was required to hold as trustee to secure the payments of all mortgage certificates duly issued by said Mortgage Securities, Inc. of Santa Barbara and authenticated by said Security Title Insurance and Guarantee Company; further, said action involved the question of the liability of said Mortgage Securities, Inc. of Santa Barbara and of said Security

Title Insurance and Guarantee Company to the holders of the valid mortgage certificates duly issued by said Mortgage Securities, Inc. of Santa Barbara and authenticated by said Security Title Insurance and Guarantee Company; also, said action involved the question of the rights of Mortgage Securities, Inc. of Santa Barbara in and to the properties and funds held by said Security Title Insurance and Guarantee Company as said trustee and in and to whatever, if any, surplus might remain in the hands of said trustee after the payment of the valid mortgage certificates aforementioned duly issued by said Mortgage Securities, Inc. of Santa Barbara and authenticated by said Security Title Insurance and Guarantee Company and after the payment of whatever, if any, other claims might be prior and superior to the right of said Mortgage Securities, Inc. of Santa Barbara to such surplus.

That judgment was duly made, rendered and entered on or about October 6, 1937, in the above-entitled action; that the aforementioned Security Title Insurance and Guarantee Company and Jane V. Reinert, one of the parties to the above-entitled [45] action, subsequent to the entry of the judgment aforementioned each moved for a new trial in said action; but, said motions for a new trial have both been and each of them has been heretofore denied; that said Security Title Insurance and Guarantee Company and said Jane V. Reinert have each appealed from the judgment aforementioned to

the Supreme Court of the State of California, and said appeals are now pending in said Supreme Court of the State of California.

That the judgment and decree aforementioned is greatly to the advantage and profit and pecuniary good and gain of said Mortgage Securities, Inc. of Santa Barbara, its creditors and stockholders in general.

That the sum of \$2500.00 is a reasonable and just and fair sum as and for attorneys' fees for the services rendered by said E. W. Squier and J. F. Goux to and for said Mortgage Securities, Inc. of Santa Barbara, in the above-entitled action.

That on the 9th day of July, 1935, G. Virginia Kaysser commenced an action in the Superior Court of the State of California, in and for the County of Santa Barbara, against Mortgage Securities, Inc. of Santa Barbara to recover the amount claimed by her to be due as assignee of The First National Trust and Savings Bank of Santa Barbara, a national banking association, of and under five renewal notes which she claims were executed by Mortgage Securities, Inc. of Santa Barbara for and on account of indebtedness in the principal sum of Fifty Thousand Dollars (\$50,000.00) which she claims was for money borrowed by said Mortgage Securities, Inc. of Santa Barbara from said The First National Trust and Savings Bank of Santa Barbara, said borrowed [46] money and indebtedness being evidenced by five certain promissory notes

executed by said Mortgage Securities, Inc. of Santa Barbara and each payable to said bank, or order. In and by her complaint aforementioned said G. Virginia Kaysser alleged and claimed that prior to the commencement of said action said bank aforementioned assigned and transferred to her, said G. Virginia Kaysser, all of said bank's title and interest in and to said original obligation, with interest, and in and to said original and renewal notes. Said action is numbered 26699 on the records of said Court and is still pending.

That on the 6th day of November, 1935, G. Virginia Kaysser commenced an action in the Superior Court of the State of California, in and for the County of Santa Barbara, against Mortgage Securities, Inc., of Santa Barbara to recover the amount claimed by her to be due as assignee of County National Bank & Trust Company of Santa Barbara, a national banking association, of and under two renewal notes which she claims were executed by Mortgage Securities, Inc., of Santa Barbara for and on account of indebtedness in the principal sum of Thirty Thousand Dollars (\$30,000.00) which she claims was for money borrowed by said Mortgage Securities, Inc., of Santa Barbara from said County National Bank & Trust Company of Santa Barbara, said borrowed money and indebtedness being evidenced by three original promissory notes executed by said Mortgage Securities, Inc., of Santa Barbara and each payable to said Bank, or order.



In and by her complaint aforementioned said G. Virginia Kaysser alleged and claimed that prior to the commencement of said action said Bank aforementioned assigned and transferred to her, said G. Virginia Kaysser, all of said Bank's title and interest in and [47] to said original obligation, with interest, and in and to said original and renewal notes. Said action is numbered 27038 on the records of said Court and is still pending.

That on or about the 16th day of October, 1934, Alice W. Jackson commenced an action in the Superior Court of the State of California, in and for the County of Santa Barbara, against Mortgage Securities, Inc., of Santa Barbara to recover the amount claimed by her to be due as assignee of Winsor Soule for and on account of indebtedness in the principal sum of Five Thousand Dollars (\$5,000.00), said indebtedness being evidenced by a promissory note dated November 1, 1931, executed by said Mortgage Securities, Inc. of Santa Barbara and payable to said Winsor Soule, or order. In and by her complaint aforementioned said Alice W. Jackson alleged and claimed that prior to the commencement of said action said Winsor Soule assigned and transferred to her, said Alice W. Jackson, all of said Winsor Soule's title and interest in and to said original obligation, with interest, and in and to said note. Said action is numbered 25941 on the records of said Court and is still pending.

That said Mortgage Securities, Inc., of Santa Barbara, a corporation, has employed and hired E. W. Squier and J. F. Goux to represent said corporation and to serve and act as the attorneys of said corporation in each of said actions, for which Mortgage Securities, Inc., of Santa Barbara promised and agreed and obligated itself to pay said E. W. Squier and said J. F. Goux reasonable attorneys' fees for services by them to be rendered as such attorneys for said corporation; that said attorneys appeared in each of said actions for said corporation and have at all times since represented said corporation in each [48] of said actions and have been the only attorneys representing said corporation in each of said actions.

That the sum of \$300.00 is a reasonable and just and fair sum as and for attorneys' fees for the services rendered by E. W. Squier and J. F. Goux to and for said Mortgage Securities, Inc., of Santa Barbara in the above-entitled action No. 26699.

That the sum of \$300.00 is a reasonable and just and fair sum as and for attorneys' fees for the services rendered by E. W. Squier and J. F. Goux to and for said Mortgage Securities, Inc., of Santa Barbara in the above-entitled action No. 27038.

That the sum of \$200.00 is a reasonable and just and fair sum as and for attorneys' fees for the services rendered by E. W. Squier and J. F. Goux to and for said Mortgage Securities, Inc., of Santa Barbara in the above-entitled action No. 25941.

That said E. W. Squier and J. F. Goux have in matters correlated with and relating and pertaining to the aforementioned actions acted as counsellors and legal advisors of said Mortgage Securities, Inc., of Santa Barbara and for said general legal advice and counsel have rendered valuable services to and for said Mortgage Securities, Inc., of Santa Barbara, for which said Mortgage Securities, Inc., of Santa Barbara has promised and agreed to pay and is obligated to pay said E. W. Squier and J. F. Goux the sum of \$250.00 which *said of* \$250.00 is a reasonable and just and fair sum as and for the legal services rendered by said E. W. Squier and said J. F. Goux to and for said Mortgage Securities, Inc., of Santa Barbara in said correlated and related matters.

That no part of said debt due, as aforesaid, [49] to deponents, amounting to \$3550.00 has been paid; that there are no offsets or counterclaims to the same or any part hereof and the deponents have not, nor has either of them, nor has any person by their order or the order of either of them, or to their knowledge or the knowledge of either of them, or belief, for their use or the use of either of them, had or received any manner of security for said debt whatsoever or any part thereof; that no note has been received for said debt or any part thereof, nor has any judgment been rendered thereon.

E. W. SQUIER

J. F. GOUX

Subscribed and sworn to before me this 8th day of July, 1938.

[Seal] EDWARD J. TREVEY

Notary Public.

My Commission Expires Aug. 6, 1940.

[Endorsed]: Filed U. S. District Court, Jul. 8, 1938. Hugh J. Weldon, Referee in Bankruptcy. [50]

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EXHIBIT "B"

[Title of District Court and Cause.]

Proof of Unsecured Debt

At Santa Barbara, in said Southern District of California, on the 13th day of September, A. D. 1938, came Thomas J. Smitheram of Santa Barbara, in the County of Santa Barbara, in said Southern District of California, and made oath, and says that Mortgage Securities Inc. of Santa Barbara, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of Four hundred thirty three dollars; that the nature and consideration of said debt is as follows:

Money deposited with bankrupt for and on account of purchase of 1st mortgage certificate which said certificate was not delivered to claimant; that no part of said debt has been paid; that there are

no set-offs or counterclaims to the same, and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever; that no note has been received for said debt or any part thereof, nor any judgment rendered thereon.

THOMAS J. SMITHERAM

Subscribed and sworn to before me this 13 day of September, A.D. 1938.

[Seal] STANLEY T. TOMLINSON

Notary Public in and for the  
County of Santa Barbara,  
State of California.

[Endorsed]: Filed: Sep. 15, 1938. Hugh J. Weldon, Referee in Bankruptcy. [51]

In the District Court of the United States  
Southern District of California

Central Division

No. 31965-C

In Bankruptcy

In the Matter of

MORTGAGE SECURITIES INC. OF SANTA  
BARBARA, a corporation,

Bankrupt.

MEMORANDUM OF POINTS AND AUTHOR-  
ITIES IN SUPPORT OF PETITION OF  
INTERVENING CREDITORS

It is discretionary with the Court to allow inter-  
vention of creditors to join in the involuntary  
petition in bankruptcy after adjudication, since the  
Court in view of the pending petition for order  
vacating adjudication for bankruptcy does not lose  
jurisdiction of the proceedings.

In re, Jutte, 258 Fed. 422.

In re, First National Bank, 152 Fed. 64.

Sandusky v. National Bank, 90 U. S. 289  
at 293.

In re, Kottenai Motor Co. 41 Fed (2d) 403  
The Bankruptcy Act of 1898, Section 59,  
Sub. (f)

provides:

“Creditors other than original petitioners  
may *at any time* enter their appearance and

join in the petition etc." (The italics are the writer's.)

See also Remington on Bankruptcy, Vol. 1,  
Sec. 233.

Respectfully submitted,

STANLEY T. TOMLINSON

W. P. BUTCHER

Attorneys for Petitioners

[Endorsed]: Petition of Intervening Creditors  
filed May 23, 1939. [52]

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[Title of District Court and Cause.]

MOTION TO DISMISS PETITION FOR AN  
ORDER VACATING ADJUDICATION

Now comes George Giovanola as Trustee in Bankruptcy of the above named bankrupt in the above-entitled proceedings, and moves the Court for an order dismissing, with costs, the petition for an order vacating adjudication for bankruptcy filed in said proceeding on the 20th day of April, 1939, and this he asks upon the ground that said petition does not state facts sufficient to constitute grounds for vacating the order of adjudication in that:

First: It does not appear on the face of the petition for involuntary bankruptcy that the Court did not have the jurisdiction of said proceedings and to make its order for adjudication.

Second: That as appears from said petition, said J. H. McCune claims to be the assignee of the County National Bank and Trust Company of Santa Barbara of an alleged claim of said County National Bank and Trust Company of Santa Barbara against said bankrupt, evidenced by certain promissory notes made by said bankrupt; and Alice W. Jackson, claims to be the assignee or transferee of Winsor Soule of a certain alleged claim of said Winsor Soule against said bankrupt, evidenced by a promissory note alleged to have been made by said bankrupt in favor of said Winsor Soule that as such assignees of said claims, respectively, they have, and each of them have not been, nor are they, nor will they be prejudiced or damaged by said adjudication. [54]

That said petitioners Fred D. Jackson and Alice P. Jackson claim to own certain preferred stock and certain common stock of said Mortgage Securities, Inc., of Santa Barbara, as alleged in Paragraph VI of their petition herein, and it does not appear that they have any interest in the above-entitled bankruptcy matter, other than their interest as such stockholders; that said Fred D. Jackson and Alice P. Jackson are not qualified or authorized as such stockholders, or otherwise, to question the jurisdiction of this Court in the above-entitled bankruptcy proceeding or the jurisdiction of this Court to make the adjudication of bankruptcy herein, in that it does not appear that they, or either



of them, took, or attempted to take any action or to cause the officers of said Mortgage Securities, Inc. of Santa Barbara to take any action in respect to the above-entitled proceeding, or to resist or oppose the petition to have said Mortgage Securities, Inc. of Santa Barbara, adjudged a bankrupt, or to have the adjudication made herein set aside; that they, and each of them, have not been, nor are they, nor will they be prejudiced or damaged by said adjudication.

Third: That it appears from said petition that the petitioners named in the petition for involuntary bankruptcy of the above named bankrupt was made and filed by creditors having provable claims in bankruptcy, namely: a claim on the part of the First National Trust and Savings Bank founded upon a promissory note, and claims of stockholders who paid their proportionate liability, and under Section 322-A of the Civil Code of the State of California, had a direct claim against the above named bankrupt and not by virtue of any assignment or splitting of any claim as alleged by said objecting petitioners.

Fourth: That it appears on the face of said proceedings that the petitioners, J. H. McCune, Alice W. Jackson, Fred D. Jackson and Alice P. Jackson, have been guilty of laches and un- [55] reasonable delay in objecting to the adjudication in bankruptcy in that said petitioners were creditors at the time of the filing of said involuntary petition in

bankruptcy namely: on the 1st day of June, 1938, and until the filing of their petition made no motion or filed any petition before the above named Court to vacate or set aside said order of adjudication, filed claims against said bankrupt, attended the meetings of creditors before the Referee in Bankruptcy, made no objection prior to the order of adjudication to said proceedings, and allowed and permitted the Trustee in Bankruptcy to act in his capacity, as such, from and after his appointment and qualification; and for a long period of time and until the 20th day of April, 1939, took no steps whatever before the above named Court to object to its jurisdiction or to vacate said order of adjudication and under the presumption that an officer regularly and duly performed his duties, said trustee has duly and regularly performed his duties during all of said period of time as an officer of the above named Court and as appears in the records and files before the Referee in Bankruptcy, has instituted an action as said trustee against the said Fred D. Jackson, Alice P. Jackson, Alice W. Jackson and others to recover certain assets of said bankrupt corporation which were fraudulently conveyed to said parties to deprive the creditors of the benefit of the assets of said corporation reference being had to the records of said Referee in Bankruptcy for further particulars; that it was not until the filing of said action by said Trustee; namely: on the 10th day of March, 1939, did said parties file

their petition to set aside said order of adjudication; that said records and files of said Referee further disclosed that said J. H. McCune, Alice W. Jackson and Alice P. Jackson, filed claims in bankruptcy against said bankrupt corporation with said Referee.

Dated: May 26th, 1939.

W. P. BUTCHER

Attorney for George Giovanola  
as Trustee in Bankruptcy

[Endorsed]: Filed May 29, 1939. [56]

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[Title of District Court and Cause.]

ANSWER TO "PETITION OF INTERVENING  
CREDITORS"

Come now J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, and answer the "Petition of Intervening Creditors" filed herein by Thomas J. Smitheram, E. W. Squier, and J. F. Goux, and admit, deny, and allege as follows, to-wit:

I

J. H. McCune is now, and ever since the 13th day of January, 1938, has been, the owner and holder of certain promissory notes executed by the above named bankrupt, and a creditor of such said bankrupt with a claim provable in bankruptcy, all of

which, together with all facts and circumstances in connection therewith, is set forth in detail in the "Petition for Order Vacating Adjudication for Bankruptcy" heretofore filed herein, which said "Petition for Order Vacating Adjudication for Bankruptcy" is hereby incorporated herein by reference to the same force and effect as if set out here in its exact words and figures, reference thereto being hereby made.

Alice W. Jackson is the owner and holder of a certain promissory note executed by Mortgage Securities Inc. of Santa Barbara, bankrupt above named, and is now, and ever since the 10th day of October, 1934, has been, a creditor of the said bankrupt with a provable claim in bankruptcy, all of which, together with [57] the details thereof, is set forth in the "Petition for Order Vacating Adjudication for Bankruptcy" on file herein, and hereinabove incorporated in this answer, reference thereto being hereby made.

Fred D. Jackson and Alice P. Jackson at all times herein mentioned have been, and now are, stockholders of Mortgage Securities Inc. of Santa Barbara, a corporation, bankrupt above named, and now own and hold shares of stock of the said corporation as follows, to-wit:

Preferred Stock	4921½ shares
Common Stock	450        “

## II

Answering the allegations of paragraph II appearing on page 2, of the "Petition of Intervening Creditors," these answering parties admit that on the first day of June, 1938, the above entitled Court did make an order purporting to adjudicate Mortgage Securities Inc. of Santa Barbara, a corporation, a bankrupt; admit that a purported order of reference was made to Hugh J. Weldon, a Referee in Bankruptcy; and admit that George Giovanola claims to be the elected Trustee in Bankruptcy of the estate of the said purported bankrupt. Other than herein admitted, these answering parties deny generally and specifically each and every allegation of such said paragraph II, and the whole thereof.

## III

Answering the allegations of paragraph VI of the said "Petition of Intervening Creditors," these answering parties deny that at any time or at all the said Thomas J. Smitheram had, or now has, a provable claim in bankruptcy against Mortgage Securities Inc. of Santa Barbara; and deny that the said Thomas J. Smitheram at the times mentioned in the said paragraph VI, or at any other time whatsoever or at all, was or is qualified and competent, or qualified, or competent, to petition for the adjudication in bank- [58] ruptcy of the said bankrupt. In this connection, these answering parties allege that the purported claim of Thomas J. Smitheram against

Mortgage Securities Inc. of Santa Barbara, if any, at the time of the said petition in bankruptcy herein, was, and now is, barred by the provisions of Sections 337, 338, and 339, Code of Civil Procedure of the State of California.

And for a Second, Separate and Distinct Defense,

These Answering Parties Allege:

I

The said "Petition of Intervening Creditors" fails to state or set forth sufficient facts upon which the relief requested may be granted, and fails to state sufficient facts to establish that the said petitioners have provable claims in bankruptcy or are entitled to intervene in the above entitled action.

And for a Third, Separate, and Distinct Defense,

These Answering Parties Allege:

I

That the above entitled Court has no jurisdiction to grant the said "Petition of Intervening Creditors" in that a purported adjudication has been made and entered in the within action, and in that the involuntary petition in bankruptcy on file herein is insufficient on its face, and does not state sufficient facts, to give the above entitled Court jurisdiction of the within proceedings, or to entitle the said petitioners to intervene herein.

Wherefore, these answering parties pray that the "Petition of Intervening Creditors" be denied and dismissed.

T. H. CANFIELD

Attorney for J. H. McCune,  
Alice W. Jackson, Fred D.  
Jackson, and Alice P. Jack-  
son. [59]

State of California

County of Santa Barbara—ss.

Fred D. Jackson, being duly sworn, deposes and says:

That he is an answering party in the above entitled bankruptcy matter; that he has read the foregoing Answer to "Petition of Intervening Creditors" and knows the contents thereof; and that the facts and allegations therein set forth are within his own knowledge and are true.

FRED D. JACKSON

Subscribed and sworn to before me, this 26th day of May, 1939.

[Seal] T. H. CANFIELD

Notary public in and for said  
County and State.

[Endorsed]: Filed May 29, 1939. [60]

[Title of District Court and Cause.]

ANSWER TO PETITION FOR ORDER VACATING ADJUDICATION FOR BANKRUPTCY

Before the Honorable Judge Cosgrave, Judge of the Above Entitled Court:

This verified answer of First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefler, and Peter Davidson and Catherine Davidson, petitioning creditors herein, respectfully shows:

I.

Answering the allegations of paragraph IX of said petition, these petitioning creditors allege that the assignment by First National Trust and Savings Bank of Santa Barbara to G. Virginia Kaysser, referred to in said paragraph IX, was made solely and exclusively for the purpose of enforcing collection of said promissory notes; that prior to the filing of the involuntary petition in bankruptcy herein, the said G. Virginia Kaysser did reassign and re-transfer said promissory notes to First National Trust and Savings Bank of Santa Barbara and at the time of the filing of the petition herein the said First National Trust and Savings Bank of Santa Barbara was the owner and holder of said notes and of all right, title and interest therein and thereto; further answering said paragraph IX, and particularly the second paragraph contained on page 12 of said petition, these petitioning creditors



allege that the claim of Horace P. Hoefer is a valid outstanding and provable claim against the bankrupt herein and is a direct and primary obligation of said bankrupt; further [61] answering the allegations of paragraph IX of said petition, and particularly the second paragraph on page 15 thereof, these petitioning creditors allege that the claim of Peter Davidson and Catherine Davidson is a valid outstanding and provable claim against the bankrupt herein and is a direct and primary obligation of said bankrupt.

## II.

Answering the allegations of paragraph X of said petition commencing with the words "Prior to the filing" and ending with the words "subrogated as set forth above" these petitioning creditors deny each and every allegation therein contained.

## III.

Answering the allegations of paragraph XI of said petition, these petitioning creditors deny each and every allegation therein contained and the whole thereof.

## IV.

Answering the allegations of paragraph XIII of said petition, these petitioning creditors deny each and every allegation therein contained; further answering said paragraph, these petitioning creditors allege that on the 25th day of June, 1938, Hugh J. Weldon, the duly appointed, qualified and acting

referee herein cause to be published notice of the adjudication in bankruptcy and notice that the first meeting of creditors would be held on the 8th day of July, 1938; that the said J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson did at that time obtain full knowledge and information of the form and contents of said involuntary petition in bankruptcy and were fully advised of all proceedings taken herein; that by reason of their laches and inexcusable delay, said petitioners are estopped from now objecting to the proceedings herein and from further prosecuting their petition to set aside the adjudication [62] in bankruptcy.

#### V.

Further answering said petition for order vacating adjudication, these petitioning creditors allege that if it be determined that stockholders of Mortgage Securities, Inc. of Santa Barbara, who have heretofore paid their proportionate stockholders' liability in payment of debts and obligations of said Mortgage Securities, Inc. of Santa Barbara, do not have provable claims herein, then and in that event the number of creditors with provable claims against said bankrupt as of the date of the filing of the petition herein and as of the date of the order of adjudication were less than twelve (12) in number and under the provisions of Section 59(b) of the Bankruptcy Act of 1938, one creditor having a provable claim amounting in excess of the value of

securities held, if any, to Five Hundred Dollars (\$500.00) may file an involuntary petition in bankruptcy.

Wherefore, these petitioning creditors pray that the petition of the said J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson be denied.

Dated: This 26th day of May, 1939.

JOHN WILLIAM HEANEY

FRANCIS PRICE

A. C. POSTEL

HAROLD A. PARMA

By HAROLD A. PARMA

Attorneys for said petitioning  
creditors. [63]

State of California

County of Santa Barbara

City of Santa Barbara—ss.

Chas. W. Hague, Assistant Vice President of the First National Trust and Savings Bank of Santa Barbara, one of the petitioning creditors mentioned in the foregoing Answer to Petition for Order Vacating Adjudication for Bankruptcy, and duly authorized to make this oath on behalf of said petitioning creditor, does hereby *made* solemn oath that the statements of fact contained in the foregoing answer are true.

CHAS. W. HAGUE

Subscribed and sworn to before me this 26th day  
of May, 1939.

[Seal] KATE ORD NELSON

Notary Public in and for the  
County of Santa Barbara,  
State of California

My Commission Expires February 5, 1941 [64]

Service of the within Answer to Petition for Or-  
der Vacating Adjudication for Bankruptcy, by  
receipt of a copy thereof, is hereby admitted this  
26th day of May, 1939.

EDWARD GALLAUDET and  
T. H. CANFIELD

Attorney for J. H. McCune,  
Alice W. Jackson, Fred D.  
Jackson and Alice P. Jackson,  
Petitioners.

[Endorsed]: Filed Jun. 5, 1939. [65]

In the District Court of the United States  
Southern District of California  
Central Division  
No. 31965-C. Bkey.

In the Matter of

MORTGAGE SECURITIES INC. OF SANTA  
BARBARA, a corporation,

Bankrupt.

MEMORANDUM OF ORDER

Cosgrave, District Judge.

The petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene in the above entitled matter as petitioning creditors filed on May 23, 1939, is granted.

The petition of J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson for order vacating the adjudication in bankruptcy heretofore entered in the above entitled matter is denied, and the motion of George Giovanola as Trustee in Bankruptcy to dismiss the said petition is granted on all the grounds set forth in the motion of the said Trustee to dismiss.

June 27, 1939.

[Endorsed]: Filed Jun. 27, 1939. [67]

In the District Court of the United States  
Southern District of California  
Central Division

No. 31965-C

In the Matter of

MORTGAGE SECURITIES INC. OF SANTA  
BARBARA, a corporation,  
Bankrupt.

ORDER DENYING PETITION TO VACATE  
ORDER OF ADJUDICATION

The petition of J. H. McCune, Alice W. Jackson, Fred D. Jackson and Alice P. Jackson for an order vacating the adjudication in bankruptcy heretofore entered in the above entitled matter coming on regularly for hearing before the Honorable G. Cosgrave, Judge of the above-entitled Court on the 29th day of May, 1939, T. H. Canfield appearing as attorney for said petitioners, and W. P. Butcher appearing as attorney for George Giovanola as trustee in bankruptcy in the above-entitled matter and moving to dismiss said petition of said petitioners, said cause was argued and submitted to the Court for its consideration and decision and the Court being fully advised in the premises does now hereby

Ordered that the petition of said J. H. McCune, Alice W. Jackson, Fred D. Jackson and Alice P. Jackson for an order vacating the adjudication in

bankruptcy heretofore entered in the above-entitled matter be and the same is hereby denied and the motion of George Giovanola as trustee in bankruptcy to dismiss said petition be and the same is hereby granted on all the grounds set forth in the motion of said trustee to dismiss.

Dated this July 13, 1939.

GEO. COSGRAVE

District Judge

[Endorsed]: Filed Jul. 14, 1939. [68]

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In the District Court of the United States  
Southern District of California  
Central Division  
No. 31965-C

In the Matter of

MORTGAGE SECURITIES INC. OF SANTA  
BARBARA, a corporation,

Bankrupt.

ORDER ALLOWING INTERVENTION OF  
CREDITORS

Upon the petition of Thomas J. Smitheram, J. F. Goux and E. W. Squier for leave to intervene in the above-entitled matter as petitioning creditors filed on May 23rd, 1939, duly verified and upon proceedings heretofore had herein and upon motion of W.

P. Butcher, Esq., attorney for said petitioners it is hereby

Ordered that the said petitioners be and they are hereby allowed to intervene herein and are hereby joined as intervening petitioning creditors in the petition in involuntary bankruptcy heretofore filed herein.

Dated this July 13, 1939.

GEO. COSGRAVE

District Judge

[Endorsed]: Jul. 14, 1939. [69]

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice is hereby given that J. H. McCune and Alice W. Jackson, creditors of Mortgage Securities Inc. of Santa Barbara, bankrupt herein, and Fred D. Jackson and Alice P. Jackson, stockholders of Mortgage Securities Inc. of Santa Barbara, bankrupt herein, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from:

(1) The order of the above entitled Court denying the petition of J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson for an order vacating the adjudication in bankruptcy heretofore entered in the above entitled matter, and granting the motion of George Giovanola, as Trustee in Bankruptcy, to dismiss the



said petition of J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson for an order vacating the adjudication in bankruptcy heretofore entered in the above entitled matter, which said order was entered in Volume 6 of Minutes of the above entitled Court, at pages 448 and 449, on June 27, 1939.

(2) From the written "Order Denying Petition to Vacate Order of Adjudication", and the whole thereof, made and filed in the above entitled matter on July 14, 1939. [70]

Dated this 24th day of July, 1939.

T. H. CANFIELD

Attorney for J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, Appellants.

Address:

Room 222 La Arcada Building,  
Santa Barbara, California.

[Endorsed]: Copy mailed July 28, 1939, to W. P. Butcher, 1010 State Street, Santa Barbara, Cal.; W. P. Butcher and Stanley Tomlinson, 1010 State Street, Santa Barbara, Cal., and Heaney, Price, Postel & Parma, 21 E. Canon Perdido Street, Santa Barbara, Cal. Cost bond \$250.00 filed.

R. S. ZIMMERMAN,

Clerk.

By E. L. S.

[Endorsed]: Filed Jul. 26, 1939. [71]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable George Cosgrave, Judge of the  
United States District Court for the Southern  
District of California, Central Division:

J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, conceiving themselves aggrieved by the order of the above entitled Court denying their petition for an order vacating the adjudication in bankruptcy heretofore entered in the above entitled matter, and granting the motion of George Giovanola, as Trustee in Bankruptcy, to dismiss their petition for an order vacating the adjudication in bankruptcy, which said order was entered in Volume 6 of Minutes of the above entitled Court, at pages 448 and 449, on June 27, 1939, and which said order was signed and filed in writing on July 14, 1939, do hereby petition for an appeal from the said order to the United States Circuit Court of Appeals for the Ninth Circuit, and pray that their appeal may be allowed and a citation granted, directed to First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefler, Peter Davidson, Catherine Davidson, and George Giovanola, as Trustee in Bankruptcy, commanding them and each of them to appear before the United States Circuit Court of Appeals for the Ninth Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the records, proceedings and [72] evidence in said proceeding, duly authenti-

cated, may be transmitted to the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated this 24 day of July, 1939.

T. H. CANFIELD

Attorney for J. H. McCune, Alice W. Jackson,  
Alice P. Jackson, and Fred D. Jackson.

The foregoing appeal is hereby allowed.

Dated this 26 day of July, 1939.

WM. P. JAMES

Judge of the above entitled Court, signing in lieu  
of Judge Cosgrave who is absent from the  
district.

[Endorsed]: Filed Jul. 26, 1939. [73]

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[Title of District Court and Cause.]

#### ASSIGNMENT OF ERRORS

Now comes J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson, appellants herein, and file the following assignment of errors on appeal from the order of the above entitled Court denying their petition for an order vacating the adjudication in bankruptcy heretofore entered in the above entitled matter, and granting the motion of George Giovanola, as Trustee in Bankruptcy, to dismiss their petition for an order vacating the said adjudication in bankruptcy, which order was heretofore entered in the above entitled matter in Volume 6 of Minutes of the above entitled Court at pages 448 and 449, on June 27, 1939,

and signed and filed in writing in the above entitled matter on July 14, 1939:

The United States District Court for the Southern District of California, Central Division, erred in denying the said petition of the appellants for an order vacating the adjudication in bankruptcy heretofore entered in the above entitled matter, and granting the motion of the said George Giovanola, as Trustee in Bankruptcy, dismissing the said petition of the appellants, in that:

(1) The original involuntary petition in bankruptcy filed in the within proceeding, upon which the said involuntary adjudication in bankruptcy was based, was insufficient on its face [74] to give the above entitled Court any jurisdiction on the proceeding.

(2) The original involuntary petition in bankruptcy shows on its face that two of the petitioning creditors thereunder did not have provable claims in bankruptcy.

(3) The above entitled Court should not have refused permission to the appellants to introduce evidence in support of their petition.

(4) The original adjudication of bankruptcy in the within proceeding is void and in excess of the jurisdiction of the above entitled Court.

Wherefore, appellants pray that said order may be reversed.

T. H. CANFIELD.

Attorney for J. H. McCune, Alice W. Jackson,  
Alice P. Jackson, and Fred D. Jackson.

[Endorsed]: Filed Jul. 26, 1939. [75]

[Title of District Court and Cause.]

### STATEMENT OF POINTS ON APPEAL

J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, Appellants herein, present herewith this "Statement of Points on Appeal" in connection with the appeal from the order of the above entitled Court denying the petition for order vacating the adjudication in bankruptcy and granting the motion of George Giovanola, Trustee in Bankruptcy, to dismiss the said petition for order vacating adjudication in bankruptcy, and respectfully submit the following:

#### I

It is necessary that each creditor joining in an involuntary petition in bankruptcy be the owner of a demand or claim provable against the bankrupt within the provisions of the Bankruptcy Act. The existence of provable claims to the requisite amount is jurisdictional in an involuntary proceeding, and if such jurisdictional defect appears on the face of the record, the Court acquires no jurisdiction and any adjudication thereunder is void.

In the instant case, it appears from the face of the involuntary petition in bankruptcy, upon which the adjudication of involuntary bankruptcy was made, that the claims of two of the petitioning creditors are not provable claims in bankruptcy.

[76]

#### II

Two of the three claims set forth in the original involuntary petition in bankruptcy do not repre-

sent provable claims in bankruptcy within the provisions of the Bankruptcy Act, in that such said two claims represent claims of stockholders of the bankrupt corporation, which claims are based upon the purported subrogation of such said stockholders to a portion of certain general claims against the bankrupt corporation. This purported subrogation arises from payments by such said stockholders of their proportionate share of stockholders' liability for payment of general claims against the bankrupt corporation. Such two claims are in effect portions only of general claims against the bankrupt corporation, such said petitioning creditors having been subrogated only to a portion of such said general claims. One who becomes subrogated only to a portion of a creditor's claim, has not a provable claim in bankruptcy, unless such creditor fails or refuses to prove the entire claim, in which event the subrogated party may prove the claim in the name of the original creditor.

### III

Section 322a of the Civil Code of the State of California, under the authority of which said Code Section two of the original petitioners in the involuntary petition in bankruptcy base their claim, is unconstitutional insofar as it purports to allow partial subrogation, in that it infringes upon and impairs rights which had vested at the time of its enactment, and in that it is violative of the due process clauses and of the contract and ex post

facto clauses of the Constitution of the United States and the State of California.

Dated this 31st day of July, 1939.

T. H. CANFIELD.

Attorney for Appellants. [77]

Receipt of a copy of the above "Statement of Points on Appeal" is hereby admitted this 31st day of July, 1939.

JOHN WILLIAM HEANEY,  
FRANCIS PRICE,  
A. C. POSTEL &  
HAROLD A. PARMA,

By WARNER EDMONDS, JR.

Attorneys for Appellees, First National Trust & Savings Bank of Santa Barbara, Horace P. Hoefler, Peter Davidson and Catherine Davidson.

W. P. BUTCHER

Attorney for Appellee, George Giovanola, Trustee in Bankruptcy.

[Endorsed]: Filed Aug. 2, 1939 [78]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that J. H. McCune and Alice W. Jackson, creditors of Mortgage Securities Inc. of Santa Barbara, bankrupt herein, and Fred D. Jackson and Alice P. Jackson, stockhold-

ers of Mortgage Securities Inc. of Santa Barbara, bankrupt herein, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from:

(1) The order of the above entitled Court granting the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene in the above entitled matter as petitioning creditors, and the whole of such said order, which said order was entered in Volume 6 of Minutes of the above entitled Court, at pages 448 and 449, on June 27, 1939.

(2) The written "Order Allowing Intervention of Creditors", which was made and filed in the above entitled matter on July 14, 1939.

Dated this 24th day of July, 1939.

T. H. CANFIELD

Attorney for J. H. McCune, Alice W. Jackson,  
Fred D. Jackson, and Alice P. Jackson, Ap-  
pellants.

Address:

Room 222 La Arcada Bldg.,  
Santa Barbara, California.

Copy mailed July 28, 1939, to W. P. Butcher;  
W. P. Butcher and Stanley Tomlinson; and Hea-  
ney, Price, Postel & Parma. Cost bond \$250.00 filed.

R. S. ZIMMERMAN, Clerk

By E. L. S.

[Endorsed]: Filed Jul. 26, 1939. [79]



[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable George Cosgrave, Judge of the  
United States District Court for the Southern  
District of California, Central Division:

J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, conceiving themselves aggrieved by the order of the above entitled Court granting the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene in the above entitled matter as petitioning creditors, which said order was entered in Volume 6 of Minutes of the above entitled Court, at pages 448 and 449 on June 27, 1939, which said order was made and filed in written form in the above entitled matter on July 14, 1939, do hereby petition for an appeal from the said order to the United States Circuit Court of Appeals for the Ninth Circuit, and pray that their appeal may be allowed and a citation granted, directed to Thomas J. Smitheram, E. W. Squier, and J. F. Goux commanding them and each of them to appear before the United States Circuit Court of Appeals for the Ninth Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the records, proceedings, and evidence in said proceeding, duly authenticated, may be transmitted to the [80] United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 24th day of July, 1939.

T. H. CANFIELD

Attorney for J. H. McCune, Alice W. Jackson,  
Alice P. Jackson, and Fred D. Jackson.

The foregoing appeal is hereby allowed.

Dated this 26 day of July, 1939.

WM. P. JAMES

Judge of the above entitled Court, signing for  
Judge Cosgrave who is absent from the dis-  
trict.

[Endorsed]: Filed Jul. 26, 1939. [81]

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[Title of District Court and Cause.]

#### ASSIGNMENT OF ERRORS

Now come J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson, by and through T. H. Canfield their attorney, and file the following assignment of errors on appeal from the order of this Court granting the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene in the above entitled matter as petitioning creditors, which said order was entered in Volume 6 of Minutes of the above entitled Court, at pages 448 and 449, on June 27, 1939, and which said written order was signed and filed in the above entitled matter on July 14, 1939:

The United States District Court for the Southern District of California, Central Division, erred

in granting the petition of the said Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene in the above entitled matter as petitioning creditors in that:

1.—There had been an adjudication in bankruptcy on an involuntary petition in bankruptcy originally filed in the above entitled matter, which said involuntary adjudication in bankruptcy had not been vacated prior to the order of the Court allowing such intervention. [82]

2—The involuntary petition in bankruptcy originally filed in the said proceeding, upon which the involuntary adjudication in bankruptcy was had, is insufficient on its face to give the above entitled Court any jurisdiction of the proceeding.

3—The issues of fact raised by the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene in the above entitled matter, and the “Answer to Petition of Intervening Creditors” filed on behalf of J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, have not been determined, and no evidence was offered or received in support of the said petition for leave to intervene.

4—That the said petition for leave to intervene fails to state or set forth sufficient facts upon which the relief requested may be granted, and fails to state sufficient facts to establish that the petitioners therein have provable claims in bankruptcy or are entitled to intervene in the bankruptcy proceeding.

Wherefore, the appellants pray that the said order may be reversed.

T. H. CANFIELD.

Attorney for J. H. McCune, Alice W. Jackson,  
Alice P. Jackson, and Fred D. Jackson.

[Endorsed]: Filed Jul. 26, 1939. [83]

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[Title of District Court and Cause.]

#### STATEMENT OF POINTS ON APPEAL

J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, Appellants herein, present herewith this "Statement of Points on Appeal" in connection with the appeal from the order of the above entitled Court granting the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene in the above entitled matter as petitioning creditors, and respectfully submit the following:

#### I

Additional creditors cannot intervene to join in an involuntary petition in bankruptcy after an involuntary adjudication in bankruptcy has been made and entered.

#### II

The original petition in involuntary bankruptcy filed herein, upon which the involuntary adjudication of bankruptcy was made, was insufficient on

its face to give the Court any jurisdiction in the bankruptcy proceeding, by reason of the fact that it appears from the face of such said involuntary petition in bankruptcy that two of the petitioning creditors did not have provable claims in bankruptcy. [84]

### III

Additional creditors cannot intervene to join in an involuntary petition in bankruptcy if the original involuntary petition is not sufficient on its face to give the Court jurisdiction to make the adjudication.

### IV

The petition of the intervening creditors fails to state or set forth sufficient facts upon which an intervention could be granted, and fails to state sufficient facts to establish that the petitioners therein have provable claims in bankruptcy or are entitled to intervene in the bankruptcy proceeding.

### V

The issues of fact raised by the petition of the intervening creditors for leave to intervene in the bankruptcy proceeding, and the Answer to Petition of Intervening Creditors filed on behalf of the Appellants, were not determined by the District Court, and no evidence having been offered or received in support of the petition for leave to intervene, the petition should not have been granted.

Dated this 31st day of July, 1939.

T. H. CANFIELD,

Attorney for Appellants.

Receipt of a copy of the above "Statement of Points on Appeal" is hereby admitted this 31st day of July, 1939.

W. P. BUTCHER &

STANLEY T. TOMLINSON

Attorneys for Appellees.

By S. T. T.

[Endorsed]: Filed Aug. 2, 1939. [85]

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[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, appellants herein, do hereby designate the following documents to be contained in the record on appeal herein in the matter of the appeal from the order of the above entitled Court denying the petition of the appellants for an order vacating the adjudication in bankruptcy heretofore entered, and granting the motion of George Giovanola, Trustee in Bankruptcy, to dismiss the said petition of the appellants for an order vacating the adjudication in bankruptcy:

1—Original petition in involuntary bankruptcy filed herein by First National Trust and Savings

Bank of Santa Barbara, Horace P. Hoefler, Peter Davidson and Catherine Davidson.

2—Original adjudication in involuntary bankruptcy.

3—Petition for order vacating adjudication in bankruptcy, and order to show cause issued thereon.

4—Answer to petition for order vacating adjudication for bankruptcy.

5—Motion to dismiss petition for an order vacating adjudication.

6—Transcript of the proceeding on the hearing of the [86] petition for order vacating adjudication in bankruptcy.

7—Minute order of the Court denying the petition for an order vacating the adjudication in bankruptcy and granting motion of George Giovanola, Trustee in Bankruptcy, to dismiss the petition for an order vacating the adjudication in bankruptcy, which minute order is entered in Volume 6 of Minutes, at pages 448 and 449.

8—Written order denying petition to vacate order of adjudication.

9—Notice of Appeal.

10—Petition for Appeal.

11—Assignment of Errors.

12—Citation.

13—Designation of Record on Appeal.

14—Statement of Points on Appeal.

Dated this 31st day of July, 1939.

T. H. CANFIELD,

Attorney for the Appellants.

Receipt of a copy of the above "Designation of Record on Appeal" is hereby admitted this 31st day of July, 1939.

JOHN WILLIAM HEANEY,  
FRANCIS PRICE,  
A. C. POSTEL &  
HAROLD PARMA,

By WARNER EDMONDS, JR.

Attorneys for Appellees, First National Trust & Savings Bank of Santa Barbara, Horace P. Hoefler, Peter Davidson and Catherine Davidson.

W. P. BUTCHER

Attorney for George Giovanola, Trustee in Bankruptcy, Appellee.

[Endorsed]: Filed Aug. 2, 1939. [87]

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[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, Appellants herein, do hereby designate the following documents to be contained in the record on appeal herein in the matter of the appeal from the order of the above entitled Court allowing the intervention of Thomas J. Smitheram, E. W. Squier, and J. F. Goux as petitioning creditors:

1—Original petition in involuntary bankruptcy filed herein by First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefler, Peter Davidson and Catherine Davidson.



2—Original adjudication in involuntary bankruptcy.

3—Petition of intervening creditors and order to show cause issued thereon.

4—Answer to petition of intervening creditors.

5—Transcript of the proceeding on the hearing of the said petition of intervening creditors on May 29, 1939.

6—Minute order of the above entitled Court granting the petition for leave to intervene, which minute order is entered in Volume 6 of Minutes of the above entitled Court, at pages 448 [88] and 449.

7—Written Order Allowing Intervention of Creditors.

8—Notice of Appeal.

9—Petition for Appeal.

10—Assignment of Errors.

11—Citation.

12—Designation of Record on Appeal.

13—Statement of Points on Appeal.

Dated this 31st day of July, 1939.

T. H. CANFIELD

Attorney for Appellants.

Receipt of a copy of the above "Designation of Record on Appeal" is hereby admitted this 31st day of July, 1939.

W. P. BUTCHER &

STANLEY T. TOMLINSON

Attorneys for Appellees.

By S. T. T.

[Endorsed]: Filed Aug. 2, 1939. [89]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing pages numbered from 1 to 89 inclusive, contain the Original Citations, a full, true and correct copy of Involuntary Petition; Adjudication and Order of Reference; Petition to Vacate Adjudication; Order to Show Cause; Petition of Creditors to Intervene with Exhibits A and B; Order to Show Cause; Motion of Trustee to Dismiss Petition; Answer to Petition in Intervention; Answer of Petitioning Creditors to Petition; Memorandum of Decision; Order Denying Petition to Vacate Adjudication; Order Allowing Intervention of Creditors; Two Notices of Appeal; Two Petitions for Appeal and Orders thereon; Two Assignments of Error; Two Statements of Points on Appeal; Two Designations of Contents of Record, which together with the Original Reporter's Transcript of Proceedings transmitted herewith constitute the Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to \$12.95 and that said amount has been paid me by the Appellants herein.

In testimony whereof, I have hereunto set my

hand and affixed the Seal of the said Court this 22 day of August, A. D. 1939.

[Seal]

R. S. ZIMMERMAN,

Clerk,

By: EDMUND L. SMITH

Deputy Clerk. [90]

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[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON HEARING ON PETITION OF J. H. McCUNE, ET AL., FOR ORDER VACATING ADJUDICATION IN BANKRUPTCY, ETC.

(Testimony)

Appearances:

T. H. Canfield, Esq., and Edward Gallaudet, Esq., For Petitioners.

William P. Butcher, Esq., Warner Edmonds, Esq., and Stanley T. Tomlinson, Esq., For Respondents. [92]

Los Angeles, California,

Monday, May 29, 1939, 10:00 A. M.

Mr. Canfield: May it please the court, this matter—

The Court: Just a moment. In this matter an involuntary petition was filed against Mortgage Securities, Inc., showing the required jurisdictional facts. Service was made on the president of that company, default made, and an order of adjudication followed in May or June of 1928?

Mr. Canfield: That is correct, your Honor, except that we take exception to any contention that the jurisdictional facts appeared in the petition. Our position is that the jurisdictional facts do not appear in the original petition for the adjudication.

The Court: Then the first meeting was held and the trustee appointed?

Mr. Canfield: That is correct, your Honor.

The Court: And just what took place after that?

Mr. Canfield: The trustee was appointed, if the court please.

The Court: Yes. At any rate, your petition now is to set aside the order of adjudication filed a little before a year after the order had been made?

Mr. Canfield: The original adjudication, I believe, was made approximately June 1, 1938, if the court please, and this petition to vacate the order on the ground of lack of jurisdiction was filed in less than a year. I can give [93] you the exact date. It was the 20th day of April, 1939.

The Court: Now, what do you claim to be the lack of jurisdictional facts?

Mr. Canfield: The lack of jurisdictional facts, in the opinion of the petitioner, your Honor, is the contention that the complaint or the petition for the original adjudication in bankruptcy does not set forth claims of three creditors who have provable claims in bankruptcy, that it purports to set forth three creditors' claims totaling more than \$500, but that, on the face of the petition, two of

those claims are subrogated claims which have no standing as provable claims in bankruptcy, and therefore are not provable claims, and cannot be made the subject of an involuntary petition in bankruptcy.

Following that line of reasoning, it is the position of the petitioners that, there being a defect upon the face of the petition, the court did not acquire jurisdiction, and therefore the original adjudication in bankruptcy is void and annulable.

The Court: Now, you allege lack of jurisdiction. Was one creditor qualified?

Mr. Canfield: Yes, there is one creditor who is qualified.

The Court: And the other two were creditors because they deemed themselves creditors under the stockholders liability statute? [94]

Mr. Canfield: That is correct, having paid a portion of one qualified claim and another claim which is not involved in this proceeding.

The Court: At any rate, of the debtor company?

Mr. Canfield: That is correct, your Honor.

The Court: Now, your point is that by reason either of the repeal of that statute or it having been declared invalid—repealed, wasn't it?

Mr. Canfield: The statute was repealed, your Honor, but that has no effect on this particular proceeding.

The Court: Why not?

Mr. Canfield: Our point is that the enactment of Section 322a after the repeal gave the first right of

subrogation, and that as to creditors that section is unconstitutional. In other words, it splits up the creditors' claims and makes numerous claims, and therefore those subrogated claims, under the statute and the Bankruptcy Act, do not constitute provable claims in bankruptcy.

The Court: A subrogated claim does not constitute a provable claim?

Mr. Canfield: That is our position, unless the entire amount has been paid by the creditor who has been subrogated. In the case of a subrogation, whether it be a subrogation under the statute or a subrogation in an instance of principal and surety, that if the surety, for instance, pays only a portion of the principal claim, he thereupon, in [95] equity, becomes subrogated to a portion of that claim, but he cannot himself prove that claim in bankruptcy. He must first obtain all of the claim before a subrogated creditor can come in and claim any portion of any dividend.

The Court: You had better illustrate your position.

Mr. Canfield: For instance, your Honor, in the case of principal and surety, if the surety company signs a bond for a principal, he becomes subrogated under the bond to pay a portion of the claim against that principal.

The Court: To pay a portion?

Mr. Canfield: Yes. In many cases the surety is only bound up to a certain amount. He becomes, then, liable to pay a portion of that claim, and he

thereupon becomes subrogated, under the contract with the principal and under equitable principles, to a portion of the creditor's claim which he has paid. Is that clear, your Honor?

The Court: Yes.

Mr. Canfield: So that we would have a creditor with a claim against a principal, a portion of that creditor's claim having been paid by the surety, and the surety having become subrogated only to that portion of the creditor's claim, split into two parts.

Our position, under the law and the cases, and which we are, I believe, able to substantiate, is that that surety, owning only a portion of that creditor's claim, cannot come into a bankruptcy court and prove that claim until, if and [96] when the original principal creditor refuses to do so. The Bankruptcy Act so provides in so many words, and therefore we claim that anyone who becomes subrogated by contract or by statute to a portion of a creditor's claim only, has not a provable claim in bankruptcy upon which he may file an involuntary petition in bankruptcy, or upon which he may file a claim which is provable before a referee in bankruptcy.

The Court: Now, applying your statement to the facts in the case, one of the claimants is a bank?

Mr. Canfield: Mortgages Securities owes the First National Bank of Santa Barbara \$50,000, and the First National Bank thereupon became a

creditor of Mortgage Securities. The First National Bank brought actions against the stockholders of Mortgage Securities under the old stockholders' liability of California, and forced Peter Davidson and Horace P. Hoefler to pay their stockholders' liability to the First National Bank. The legislature of California enacted Section 322a, which provides that in the event of payment by a stockholder to a creditor of a debtor, that stockholder becomes subrogated to that portion of the creditor's claim which he has paid. In this instance, Peter Davidson having paid a portion of the First National Bank claim, became, under Section 322a, subrogated to a portion of the First National Bank claim, so that, instead of having one claim against Mortgage [97] Securities, the original claim of First National Bank for \$50,000, we now have three claims, the claim of First National Bank of Santa Barbara against Mortgage Securities for the balance of its claim, the claim of Peter Davidson, after being subrogated to a portion of that claim, and the claim of Horace P. Hoefler, after having been subrogated to a portion of that claim. We have, then, in effect, instead of one original claim provable in bankruptcy, three split claims.

The Court: Let me interrupt you there.

Mr. Canfield: Yes.

The Court: Did the bank state its claim on the entire amount, or for the unpaid portion?

Mr. Canfield: In the original petition, your Honor?



The Court: Yes.

Mr. Canfield: It is my understanding that it was only upon the portion unpaid. Is that correct, Mr. Edmonds?

Mr. Edmonds: I believe so. But I believe the claim on file is only for the part due.

Mr. Canfield: The Judge means whether the original petition in bankruptcy—

The Court: Suppose the original total was \$50,000 and two stockholders each paid \$5,000, and there was a balance of \$40,000. Was that made the subject of the bank's claim?

Mr. Edmonds: I believe the petition just sets up the [98] total amount and states that certain payments have been made. The amounts of those payments are not alleged in the petition.

The Court: I understand. But what I want to get clear on is the amount of the claim of the bank. Is that the balance remaining after these payments, among others, perhaps, have been credited?

Mr. Edmonds: That is correct.

Mr. Canfield: Not in the original petition. In a claim which has been subsequently filed with the Referee that is true; not as to the original petition.

The Court: Then what is the amount of the bank's claim in the original petition?

Mr. Canfield: I am speaking now only from what counsel has just told me. The amount of the claim set forth in the original petition, your Honor, is simply an allegation that the First National Bank

is the owner of all of these promissory notes, setting forth the face amounts thereof.

The Court: Does it give the total amount of the claims?

Mr. Canfield: It lists about five notes, and says that no part of them has been paid. It lists the entire face amount of the original notes.

The Court: So that the claim of the other two creditors is a duplication?

Mr. Canfield: That is correct, your Honor.

Mr. Edmonds: May I be heard for one moment on that, [99] your Honor?

The Court: You will have plenty of time.

Mr. Canfield: The exact allegation in the original complaint is this, your Honor, that after setting forth the original notes and their original amounts and the interest thereon, the allegation is this:

“That an action was commenced in the Superior Court of the State of California, in and for the County of Santa Barbara, on July 9, 1935, to recover the amount due on said notes; that said action is still pending and said notes have not been paid.”

The subsequent allegation sets forth the subrogated claims which are attempted to be made the basis for this petition, the two subrogated claims.

The Court: They allege payment to the bank?

Mr. Canfield: They allege a payment to creditors generally, I believe. I do not believe they allege direct payment to the bank.

The Court: Well, that is the basis for your motion?

Mr. Canfield: That is, in substance, the principal basis for our motion. The point of law which will be primarily before the court is that the court must determine its jurisdiction to make the adjudication. The question as to whether or not Section 322a is constitutional as against creditors—our Appellate Court, by the way, has adjudicated it constitutional as against the corporation [100] itself—and the next point will be——

The Court: Let me interrupt you again. Does Section 322a refer to the payment on account of stockholders' liability?

Mr. Canfield: Yes, your Honor. It was put into the statute, your Honor, to take care of the case where creditors had to pay, and to give them some recourse against the corporation.

The second point that the court will be obliged to determine is this, that if Section 322a is constitutional, so as to give creditors a right of subrogation, then as to whether or not those subrogated claims are provable in bankruptcy. We have numerous cases on that, which we have submitted in our memorandum of points and authorities, to the effect that a subrogated claim is not a provable claim in bankruptcy until, if and when the party has paid the entire claim.

The Court: You have supported your petition, I suppose, with suitable authorities?

Mr. Canfield: I have supported the petition with a very complete memorandum of points and authorities, your Honor. There has been no compliance with the court rule that an answering memorandum be filed within five days. There is not at this time any memorandum of points and authorities, any answering memorandum, so we are in the dark as to the position taken by the respondent. [101]

The Court: Who is the respondent?

Mr. Canfield: The respondents are the original petitioning creditors, the Mortgage Securities, Inc., of Santa Barbara, and possibly—we do not admit this—but possibly the Trustee in Bankruptcy. I may state, your Honor, that at this time we have three motions before the court. In addition to my motion to dismiss, which has been properly noticed and which is supported by proper points and authorities, we have a petition by three other creditors of Mortgage Securities to join in the original petition. That petition is also before the court this morning on an order to show cause. To that petition we have filed an answer setting forth some special defenses, which too will be argued at this time. In addition to that, there is, on behalf of the Trustee in Bankruptcy, what purports to be a motion to dismiss our petition. That is not noticed, nor has it been set for hearing, nor was the statutory notice given, but, representing the petitioners here, we want the matter heard, and we do stipulate at this time that it may be heard at this time

and waive all notice or other jurisdictional requirements and request that that be heard in conjunction with these other motions. These three matters are before the court at this time, and I am ready to proceed on any of those matters that the court desires.

The Court: Let me hear from the proposed interveners.

Mr. Canfield: And we have interposed to this petition [102] what is in effect a demurrer or motion to strike, set out in the answer, challenging the right of the court to hear that petition to intervene, and possibly we should be heard upon that demurrer or motion to strike.

The Court: Possibly the court had better know what it is first.

Mr. Butcher: Now, if the court please,—

The Court: You are representing the proposed intervenors?

Mr. Butcher: I represent the Trustee in Bankruptcy, and also the proposed intervenors, with Mr. Stanley Tomlinson, who is associated with me, representing the proposed intervenors. We have filed an objection to the original petition, if the court please, and if I may be heard on that—

The Court: I think you had better be heard on whether the proposed intervenors have a right to be heard at this stage or whether they have a right to intervene.

Mr. Butcher: Of course, these creditors are not conceding that the original involuntary petition in

bankruptcy, if the court please, is defective for want of jurisdiction of this court. It is our contention that the creditors who signed the original petition, so-called subrogated creditors, are not in fact subrogated creditors, but have a direct statutory right to file their action against the bankrupt, and that right is founded purely and simply upon statute, and that it is not in the nature of a subrogation, [103] because it was not recognized as a right prior to the enactment of the statute, for a creditor, after paying his proportionate share, to thereupon file suit for his proportionate share that he paid. That right did not exist before, but was given to him by statute. Therefore what I am about to say is not a concession on the part of the Trustee or the creditors that there is any defect in the original petition, but if your Honor should so rule, these creditors still feel that the assets of the bankrupt should be marketed and collected, and that the suit that is now pending should be proceeded with by the Trustee, and that their interests should be protected. These creditors claim that they have a right to supplement the original petition, upon the ground that they have provable claims. The first claim is the claim of E. W. Squier and J. F. Goux, who have filed a claim in bankruptcy for attorney fees in representing the bankrupt. The other claim is the claim of Thomas J. Smitheram, which is annexed to the petition, representing money paid in to the bankrupt for a certificate for one of the se-

curities which the bankrupt was issuing, and which was never issued.

The Court: You are speaking now of the claims of the proposed intervenors?

Mr. Butcher: That is correct. They are not founded upon any stockholder's liability. They are founded upon a contract, express or implied. [104]

The Court: Is the position that counsel claims for his client conceded by you?

Mr. Canfield: If the court please, we concede the provability of the claim of Mr. Squier and Mr. Goux. We have filed an answer denying the existence of the second claim.

The Court: Then there is no need to argue further on the first.

Mr. Butcher: The second claim is attacked upon the ground that it is barred by the statute of limitations. It is our contention that the claim is still provable, and whether it is or is not barred comes up at the time we reach the allowance of claims. It does not affect the right to file a petition in involuntary bankruptcy. And I will file, if your Honor will permit me, authorities to that effect. So that the only ground upon which——

The Court: What do you say about that? Do you concede what he said?

Mr. Canfield: No, I do not, your Honor. It is our contention——

The Court: All right. I don't want a discussion of it. I merely wanted to know, to save time.

Mr. Canfield: May I proceed in answer to Mr. Butcher's petition in intervention, if he is through?

The Court: No. He is not through. You are representing two creditors whose position is conceded, I understand, [105] and one other whose position is not conceded?

Mr. Butcher: That is correct.

The Court: That is the stipulation. You got the cart before the horse. Sometimes we get confused. But have you a right to appear here and ask—

Mr. Butcher: The court has discretion—

The Court: Is that conceded by counsel?

Mr. Canfield: No, your Honor. Our position is directly contrary on that.

The Court: All right. I will hear from you on that.

Mr. Butcher: Your Honor must remember that the bankrupt was adjudged a bankrupt on the 1st day of June, 1938, a trustee was elected at a meeting called by the Referee in Bankruptcy at Santa Barbara, and it was not until the 20th day of April, 1939, that this question of the validity of the original adjudication was raised. We claim that if these other creditors have a right to object to the order of adjudication, that the whole issue is still open, and that at any time before the actual dismissal of the proceedings by the court, any other creditor may come in. I take it, your Honor, that there is no question that before adjudication is made a creditor may intervene.



Mr. Canfield: We do make a question as to that, your Honor?

Mr. Butcher: And I have authorities on that.

Mr. Canfield: I say, we do make a question as to that [106] right, your Honor.

The Court: The court will rule against you without hearing argument, because I have studied that thing to a very considerable extent, and it is a right of the creditor to intervene in a petition in bankruptcy.

Mr. Canfield: Our position is this, that in order to give that right the original petition must be sufficient on its face to give the court any jurisdiction.

The Court: I am with you on that proposition as to the right of the creditors other than the three named in the original petition to intervene.

Mr. Butcher: I am reading now from Remington on Bankruptcy, Volume 1, at page 344, in which I find this statement: "However, it is discretionary with the court to allow intervention even after order of adjudication or dismissal is entered."

I cited in my authorities here accompanying the motion to the petition that particular section and other authorities, among them *In re Jutte*, 258 Fed. 422.

Now, the Bankruptcy Act itself provides that the creditors may come in at any time, and any time has been construed, referring now to the——

The Court: What section of the Bankruptcy Act are you referring to?

Mr. Butcher: The Bankruptcy Act of 1898, Section 59, subdivision (f). [107]

The Court: Well, we must live in the present. What is it under the present act?

Mr. Butcher: I think that same wording is found in the present act, if the court please, under the same section. I might have gotten it wrong.

The Court: 58?

Mr. Butcher: Yes, if I am not mistaken.

The Court: What subdivision?

Mr. Butcher: Subdivision (f). I cited those authorities in this memorandum on the theory that they may join to supplement the original petition. Of course, the matter is thrown open by the petitioners here themselves. They are coming in to object to the order of adjudication. They are adverse petitioners. The other creditors who have rights in this matter certainly should be permitted—if there were at the time of the filing of the original petition actually enough provable claims, the court should not dismiss the bankruptcy proceeding, even though the order of adjudication in itself may be attacked, to defeat the right of creditors who had provable claims at the time of the filing of the original petition in bankruptcy. There was no attack made by the petitioning creditors at the time; they sat silently by, and now have come in here almost a year later. And that lulled these other creditors into a sense of security, in the belief that the proceedings were legal on their face, and until this

time they had a [108] right to assume that the Trustee who had been elected and appointed would carry out and perform his duties and liquidate the affairs of the bankrupt. That is the position we are in. We are put in this position by the laches and unreasonable delay of the very objectors themselves. They should not, under equity, be allowed to take advantage of that situation. If they had raised that point prior to adjudication, then the creditors, who might for the first time have knowledge of it, could have come in before the order of adjudication and at that time intervened.

The Court: You represent the proposed intervenor. What further appearances are there?

Mr. Butcher: I am appearing for the Trustee.

Mr. Edmonds: I am appearing, your Honor, on behalf of the original three petitioning creditors. First of all, if your Honor please, in connection with the statement heretofore discussed about what the original petition discloses with reference to whether or not the First National Bank of Santa Barbara had proved the right to claim that the petition does set up the correct amount of notes outstanding and alleges that they have not been paid. The petition of the two petitioning creditors Davidson and Hoefer is not that they have simply paid a portion of the claim of the First National Bank, but that they have paid in proportion to the other claims owing to other creditors of the bankrupt. Consequently, their entire claim is not based upon the fact [109] that they paid only the First National Trust and Savings Bank——

The Court: Have you the petition before you?

Mr. Edmonds: Yes. It alleges: "That your petitioners, Horace P. Hoefler, Peter Davidson and Catherine Davidson, are and each of them is a creditor of Mortgage Securities Inc. of Santa Barbara by reason of the following facts:

"That at all times mentioned herein and prior to 1931 each of said petitioners was a stockholder of Mortgage Securities Inc. of Santa Barbara and as such stockholders were liable for the debts of said Mortgage Securities Inc. of Santa Barbara in the proportion that the stock held by each bore to the whole of the subscribed capital stock of said Mortgage Securities Inc. of Santa Barbara; that prior to the 15th day of October, 1936, certain creditors of Mortgage Securities Inc. of Santa Barbara made demand upon said petitioners for payment of each of said petitioner's indebtedness to said creditors by reason of such stockholders liability; that on October 15, 1936, your petitioner, Horace P. Hoefler, paid to said creditors the sum of \$296.00 in satisfaction of his indebtedness to said creditors and by reason of such payment your petitioner, Horace P. Hoefler, has a provable claim against said Mortgage Securities Inc. of Santa Barbara in the sum of \$296.00."

Then follow similar allegations as to the payment to the creditors by Peter Davidson and Catherine

Davidson. Their [110] claim is based entirely upon payment of stockholders liability.

The Court: On this note?

Mr. Edmonds: On that note and other notes to other creditors. My sole point at this moment is that they are not merely making claim by reason of payments which they made to the other creditors here, but to other creditors who do not appear as petitioners. It is our primary position in this matter, and we submit it appears from the points and authorities cited by the petitioners who are objecting and asking for a dismissal, that a subrogated stockholder has a direct and primary claim against the bankrupt. We believe that sufficiently follows from the authorities heretofore cited in the memorandum of points and authorities by Mr. Canfield. It is our position that Section 322a, which gives a right of subrogation, must be construed and become a part of any subscription contract, and that a promise will be implied from which a direct right of contribution arises, and that on that right of contribution there is a direct contract which makes those claims provable, in that they are different from the other claims. We have also set up in the answer to the objections which we have filed a purported defense based upon this theory, that if, and only if, the subrogated stockholders who appear here as petitioning creditors are held not to have provable claims, then and in that event all of the creditors who base [111] their claims on stockholders liability—and there are numerous ones of them

—do not likewise have provable claims, and if we eliminate those stockholders who paid their stockholders liability from consideration, then there are less than 12 creditors of Mortgage Securities, Inc. of Santa Barbara. And of course one petitioning creditor is necessary in the original petition, and that one creditor is admittedly the First National Trust and Savings Bank of Santa Barbara.

The Court: Is there anything in the pleadings from which the court will know that?

Mr. Edmonds: There is nothing in the original petition, for the obvious reason that was filed on the theory that three were necessary. However, I have set up in my answer filed on behalf of the petitioning creditors a statement to that effect.

The Court: Let me interrupt you here a moment. You mean to the effect that eliminating those who claim the character of creditors on account of stockholders liability rights, that that will throw the number of creditors below 12?

Mr. Edmonds: That is correct. And I have also prepared, and was going to ask leave of this court to file, an amendment to the original petition, to include such an allegation, an allegation that the creditors are less than 12, excluding subrogated stockholders. [112]

The Court: Leave to amend the original petition?

Mr. Edmonds: Leave to amend the original petition nunc pro tunc, as of the date it was filed.

The Court: Did you file the original petition?

Mr. Edmonds: I did.

The Court: Very well. Has everybody been heard from in this initial move? Then I will hear from you, Mr. Canfield.

Mr. Canfield: May it please the court, may I direct my answering argument first to the petition of the intervening creditors Squier, Goux and Smitheram. Those are the petitioning creditors who have now asked to come in and augment the original petition. Mr. Butcher argued that matter first.

The Court: I don't care for argument. If you want to make any suggestions in reply, you may do so. I would like to ask you this: I hear no objection on account of laches here; at least I didn't get it. But is it competent, or is it lawful, at the expiration of almost a year, to come in and ask that the adjudication be set aside?

Mr. Butcher: You are asking us generally on that subject?

The Court: No. I am asking Mr. Canfield what he thinks about that.

Mr. Canfield: We are prepared to meet that point, your Honor. Would your Honor like me to argue that point [113] at the present time?

The Court: Yes. I wouldn't object to hearing from you on it.

Mr. Canfield: May it please the court, in numerous cases, cases almost without number, it has been held by various courts that a motion to vacate an adjudication in bankruptcy must be made promptly. We admit that a number of cases so hold. However, that rule is founded completely on the

doctrine of laches and estoppel in nearly every reported case. I say that, without qualification, where a petition to vacate has been denied by our appellate tribunals, or by any other tribunal, there has been some element of damage, some element of a change of condition, some element of acquiescence, or something of that order. I have a number of cases here on that point which I have prepared, and which I will be glad to submit to your Honor. However, I say in this particular instance, regardless of the question of laches, regardless of the question of estoppel, that this court must take cognizance of an objection to its own jurisdiction, must take cognizance of the question as to whether it ever acquired jurisdiction and whether we appear competently to present that fact, or whether it is pointed out to the court in some other manner. Two reported cases have directly held, while holding that the petitioner had no standing in court, that when the question of jurisdiction arises, when it becomes material to determine whether in [114] the first instance the court had jurisdiction, the court should and must of its own motion determine whether or not it still has any jurisdiction, by reason of the original jurisdictional defense. Our position is this, that if that original petition is not sufficient on its face, this court acquired absolutely no jurisdiction of the property, and, that being such a jurisdictional defect as would make all proceedings void, the court is obligated to take cognizance of that, whether or not the doctrine of laches exists. In the



second instance, if the court desires to determine on its merits the question of laches or estoppel, let me point this out, that the Mortgage Securities, Inc. of Santa Barbara was adjudicated bankrupt on or about June 1, 1938. All of these things appear in my petition, and no answer appears in answer thereto. On July 1st a trustee was appointed, and no other proceedings whatever or at all were had until what purported to be an adjourned creditors' meeting in February, at which time the people whom I represent, acting through counsel, appeared at that meeting and made the first objection I am making to your Honor at this time. We appeared at that February meeting after we obtained knowledge of these facts and objected to the jurisdiction of the court, and notified the Trustee and Referee and parties present, that we would file, when we had it properly prepared, in this court a motion to vacate. A subsequent meeting was had about three weeks later, at [115] which time we again appeared and made a similar objection, pointing out the deficiency in the original petition, and notified the Referee and Trustee and creditors present at that time that we would prepare and file a motion to vacate. If the court please, during all this time the Trustee in Bankruptcy has had possession of the assets of the Mortgage Company, and he has done nothing to administer the estate. No positions have been changed; no one has suffered; there has been no damage, no element of acquiescence in these proceedings, with the exception that we did, for the

petitioning creditors here, file a claim in the bankruptcy matter. We therefore state that, having given notice to this court at that first meeting, that that doctrine does not apply, and we desire to submit authorities on it.

The Court: Is the Mortgage Securities bankrupt?

Mr. Canfield: That, if the court please, would be a matter of proof.

The Court: I know. But are they in business?

Mr. Canfield: No.

The Court: What is the fact?

Mr. Canfield: They are not in business. They depend entirely, if the court please, upon liquidation of a number of assets which are in the hands of the Trustee.

The Court: They are not in business at the present time?

Mr. Canfield: They are not doing business, no. [116] The corporation is still in existence, but it is not doing business.

The Court: If the adjudication is set aside, what is going to happen?

Mr. Canfield: These petitioning creditors have a right, in the event this court holds that the original petition is sufficient, to join with the original creditors and have a valid adjudication. However, I would like to suggest this, that the law is well founded, regardless of the authorities cited by those petitioners, that a creditor cannot intervene after adjudication. The Supreme Court of the United

States determined that point in the case of Canute Steamship Co. v. Pittsburgh and West Virginia Coal Co., in 1923, long subsequent to the authorities cited by the petitioners.

The Court: You cite that in your memorandum?

Mr. Canfield: Yes, I do, your Honor. The cases cited by the petitioner are directly in point with our contention, and hold directly that the court has the power before adjudication and before dismissal to allow an intervention, but not afterwards.

In addition to that, we have one other point, your Honor, and that is this, that, irrespective of the matter of adjudication, we submit to the court that creditors have no right to intervene at any time unless the original petition gives the court jurisdiction. The court cannot cure a jurisdictional defect. So we are right back to our [117] original point, as to whether or not that original petition sets forth creditor claims. I have authorities, and will be glad to set them out, on that point, the point that no intervention may be permitted unless the original petition is sufficient on its face.

The Court: You may do that. I want to consider all the authorities. Let the matter stand submitted, then. It had better stand submitted in the usual way, I mean to say, follow the usual course. After the filing of all the authorities, let it stand submitted. That is to say, the proposed intervenors come in at this time and file their authorities in support of their contention and you later reply to that. Within how much time?

Mr. Canfield: They have already filed their points in support of the petition. And I have filed my points, and it may stand submitted at this time.

The Court: Do you want to file a reply to that?

Mr. Butcher: Yes, I would like to reply.

The Court: You may reply to his authorities.

Mr. Butcher: I would like also to be heard on the merits of this petition, but I don't want to have to take any more time of the court on that unless your Honor desires argument. But the thing I want to stress in behalf of the Trustee, who moved to dismiss their proceedings, is the fact that these claims of these stockholders are a direct claim against the company, and they are not subrogated [118] creditors. I want to point out that counsel made the statement that the Trustee has done nothing. We have filed an account involving hundreds of thousands of dollars of claims against one of his clients.

The Court: I guess I know about what the situation is. Then, those authorities being filed, the matter will stand submitted.

Mr. Butcher: Yes. Is that as to all these matters, your Honor?

The Court: That is all now.

Mr. Canfield: I might state to the court this proposition, which I have not had an opportunity to state on the motion of the Trustee to dismiss our petition. Our position is that the Trustee has no standing in court for that purpose. The Trustee is an officer of this court and has no standing to come

before the court and ask to dismiss what is merely a petition calling the court's attention to the matter of jurisdiction. We submit a motion to dismiss will not lie in a matter of this kind, merely bringing before the court what is already before the court.

In addition to that, your Honor, inasmuch as the answer filed by the original creditors to my petition raises only two issues of fact, one of which we concede at this time, I have prepared and ask leave to file at this time two affidavits in support of our original petition, only on the points that are at issue. [119]

The Court: Very well. You can file them. If the Trustee has no right, whose business is it to oppose this motion?

Mr. Canfield: The Mortgage Securities Inc. of Santa Barbara is the bankrupt, and we have given due and proper and legal notice to all the original petitioning creditors, under the Bankruptcy Act and under the order of this court, your Honor.

The Court: Of course, the Trustee, assuming a proper adjudication, represents both the debtor and the creditors.

Mr. Canfield: That is assuming proper adjudication.

The Court: That is what I am saying. So the sole question is the question of jurisdiction?

Mr. Canfield: That is correct, your Honor.

Mr. Tomlinson: I am associated, in the first place, with Mr. Butcher, in behalf of the three intervening creditors, and, second, I represent cer-

tain other stockholder creditors, about 12 in all, who were served with the order to show cause, generally, as creditors. They were served as a class, isn't that correct, Mr. Canfield?

Mr. Canfield: No.

Mr. Tomlinson: Creditors who had filed claims?

Mr. Canfield: We served only the creditors who had filed claims.

The Court: That is, stockholders liability?

Mr. Tomlinson: All of my other clients are stock- [120] holders claimants.

The Court: Very well.

Mr. Edmonds: May I have the opportunity to answer the affidavits being filed by Mr. Canfield on the question of whether or not—

The Court: Mr. Canfield, what are those going to be?

Mr. Canfield: We have alleged in our petition as to the time we first obtained exact knowledge of the form of this original petition. We set forth in these affidavits the facts and circumstances, and that is the only issue.

The Court: Now, your president was served? The debtor's president?

Mr. Canfield: Yes, but the point is this—

The Court: You say you don't represent the debtor?

Mr. Canfield: No, I am not representing the Mortgage Company.

The Court: Who do you represent?

Mr. Canfield: I represent certain creditors of the Mortgage Company and two stockholders who

are appearing and moving to set aside this adjudication.

The Court: All right. The president of the Mortgage Company was served?

Mr. Canfield: No. I think it was the secretary, your Honor.

The Court: Well, anyway, the secretary is an officer. I am not going to go into why he didn't or consider why he [121] didn't answer, because Santa Barbara isn't the largest place in the world, and everybody knows what is going on up there, and you can't get any indulgence from the court by reason of the proposition of failure to understand what was being done.

Mr. Canfield: The court misconstrues my position. That wasn't my position. My position was that these creditors I represent and stockholders had no actual knowledge of the fact that the petition was deficient on its face until some months afterwards.

The Court: They were able to secure active counsel and intelligent counsel, apparently, so that is removed from the court's consideration.

Mr. Canfield: I have also an affidavit of myself, as your so-called intelligent counsel, stating when I first obtained any knowledge.

The Court: I don't want to pass upon the veracity of all the inhabitants of Santa Barbara before I get through this case, and no affidavits will be filed at all.

Mr. Canfield: Very well. Would it be of any convenience to your Honor to have a transcript of this argument? I am going to have it written up.

The Court: I think not.

Mr. Butcher: What time is allowed for filing my brief?

The Court: You will have whatever is usual, say, five days. [122]

Mr. Butcher: Very well.

Mr. Canfield: If the court please, if any new points are raised in this answering brief, I assume, by indulgence of the court and counsel, I will be allowed to answer?

The Court: Well, I cannot offer you very much hope. I am afraid that the matter has been sufficiently discussed, and it is not likely that counsel will try to take any unfair advantage of you in replying to your points.

Mr. Canfield: Very well, your Honor. [123]

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I, C. W. McClain, do hereby certify that on the 29th day of May, 1939, I was a duly qualified and appointed official shorthand reporter of the United States District Court for the Southern District of California, Central Division, and that on said date I took down in shorthand writing the testimony and proceedings had and given in the matter of Mortgage Securities, Inc., of Santa Barbara, a corporation, bankrupt, No. 31963, Bankruptcy, before Hon. George Cosgrave, Judge of said court, and thereafter caused the same to be transcribed into type-writing.



I further certify that the foregoing pages, numbered from 1 to 32, both inclusive, contain a full, true and correct transcript of my shorthand notes taken as aforesaid on the above mentioned date.

Dated at Los Angeles, California, this 31st day of July, 1939.

C. W. McCLAIN,  
Official Shorthand Reporter.

[Endorsed]: Filed Aug. 1, 1939. [124]

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[Endorsed]: No. 9270. United States Circuit Court of Appeals for the Ninth Circuit. J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson, Appellants, vs. First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefler, Peter Davidson, Catherine Davidson, and George Giovanola, Trustee in Bankruptcy, of the Estate of Mortgage Securities, Inc., of Santa Barbara, a corporation, Bankrupt, Appellees, and J. H. McCune, Alice W. Jackson, Alice P. Jackson, and Fred D. Jackson, Appellants, vs. Thomas J. Smith-eram, E. W. Squier, and J. F. Goux, Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the Southern District of California, Central Division.

Filed August 23, 1939.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth *District*

No. 9270

In the matter of

MORTGAGE SECURITIES INC. OF SANTA  
BARBARA, a corporation,

Bankrupt.

---

J. H. McCUNE, ALICE W. JACKSON, FRED  
D. JACKSON, and ALICE P. JACKSON,  
Appellants.

THOMAS J. SMITHERAM, E. W. SQUIER,  
and J. F. GOUX,  
Appellees.

J. H. McCUNE, ALICE W. JACKSON, FRED D.  
JACKSON, and ALICE P. JACKSON,  
Appellants.

FIRST NATIONAL TRUST AND SAVINGS  
BANK OF SANTA BARBARA, HORACE P.  
HOEFER, PETER DAVIDSON, CATHER-  
INE DAVIDSON, and GEORGE GIOVA-  
NOLA, Trustee in Bankruptcy,  
Appellees. [126]

STIPULATION FOR CONSOLIDATION OF  
RECORD ON APPEAL

It is hereby stipulated by and between J. H. McCune, Alice W. Jackson, Fred D. Jackson, and Alice P. Jackson, Appellants herein, in the matter of the appeal of such said Appellants from the order of the above entitled Court granting the petition of Thomas J. Smitheram, E. W. Squier, and J. F. Goux for leave to intervene herein, and from the order of the above entitled Court denying the petition of said Appellants for an order vacating the adjudication in bankruptcy herein and granting the motion of George Giovanola, Trustee in Bankruptcy, to dismiss said petition for order vacating said adjudication, and First National Trust and Savings Bank of Santa Barbara, Horace P. Hoefler, Peter Davidson and Catherine Davidson, Appellees, Thomas J. Smitheram, E. W. Squier, and J. F. Goux, Appellees herein, George Giovanola, Trustee in Bankruptcy, Appellee herein, by and through their respective attorneys, as follows:

That the appeals hereinabove mentioned and the record on appeal in the matter of the said two appeals hereinabove mentioned, may be consolidated, and that said record on appeal as consolidated shall contain all portions of the record, proceedings, and evidence designated or to be designated to be included in the record on appeal in the instance of each of said appeals, but that all such portions [128] of the said record, proceedings, and evidence shall be included therein without duplication.

Dated this 18th day of August, 1939.

T. H. CANFIELD,

Attorney for Appellants.

JOHN WILLIAM HEANEY,

FRANCIS PRICE,

A. C. POSTEL,

HAROLD A. PARMA,

By WARNER EDMONDS, JR.,

Attorneys for First National  
Trust & Savings Bank of  
Santa Barbara, Horace P.  
Hoefler, Peter Davidson and  
Catherine Davidson,

Appellees.

W. P. BUTCHER,

STANLEY TOMLINSON,

Attorneys for Thomas J.  
Smitheram, E. W. Squier and  
J. F. Goux, Appellees.

W. P. BUTCHER,

Attorney for George Giova-  
nola, Trustee in Bankruptcy,  
Appellee.

[Endorsed]: Filed Aug. 22, 1939. Paul P.  
O'Brien, Clerk. [129]

United States Circuit Court of Appeals  
for the Ninth Circuit

Excerpt from proceedings of Friday, August 25,  
1939.

Before: Mathews, Stephens and Healy, Circuit  
Judges.

[Title of cause.]

ORDER CONSOLIDATING APPEALS.

Upon consideration of stipulation of counsel for  
respective parties, and good cause therefor appear-  
ing, Ordered appeals in above cause consolidated in  
one transcript of record for hearing. [131]

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[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL FROM  
ORDER DENYING PETITION FOR OR-  
DER VACATING ADJUDICATION IN  
BANKRUPTCY AND DESIGNATION OF  
RECORD.

J. H. McCune, Alice W. Jackson, Fred D. Jack-  
son, and Alice P. Jackson, Appellants in the mat-  
ter of the appeal from the order of the District  
Court of the United States, Southern District of  
California, Central Division, denying the petition  
for an order vacating the adjudication in bank-  
ruptcy and granting the motion of George Giova-  
nola, Trustee in Bankruptcy, to dismiss the said  
petition for order vacating the adjudication in

bankruptcy, respectfully submits the following state- [133] ments of points on appeal and the designation of the record necessary for the consideration thereof.

## STATEMENT OF POINTS ON APPEAL

### I.

It is necessary that each creditor joining in an involuntary petition in bankruptcy be the owner of a demand or claim provable against the bankrupt within the provisions of the Bankruptcy Act. The existence of provable claims to the requisite amount is jurisdiction in an involuntary proceeding, and if such jurisdictional defect appears on the face of the record, the Court acquires no jurisdiction and any adjudication thereunder is void.

In the instant case it appears from the face of the involuntary petition in bankruptcy, upon which the adjudication of involuntary bankruptcy was made, that the claims of two of the petitioning creditors are not provable claims in bankruptcy. The District Court, therefore, committed error in denying the petition of the Appellants to vacate the original adjudication in bankruptcy.

### II.

Two of the three claims set forth in the original involuntary petition in bankruptcy do not represent provable claims in bankruptcy within the provisions of the Bankruptcy Act, in that such said two claims represent claims of stockholders of the bankrupt

corporation, which claims are based [134] upon the purported subrogation of such said stockholders to a portion of certain general claims against the bankrupt corporation. This purported subrogation arises from payment by such said stockholders of their proportionate share of stockholders' liability for payment of general claims against the bankrupt corporation. Such two claims are in effect portions only of general claims against the bankrupt corporation, such said petitioning creditors having been subrogated only to a portion of such said general claims.

One who becomes subrogated only to a portion of a creditor's claim has not a provable claim in bankruptcy, unless such creditor fails or refuses to prove the entire claim, in which event the subrogated party may prove the claim in the name of the original creditor.

Two of the three claims set forth in the original involuntary petition in bankruptcy not being provable claims in bankruptcy, the District Court acquired no jurisdiction of the bankruptcy proceedings, and therefore committed error in denying the petition of the Appellants to vacate the adjudication in bankruptcy and committed error in granting the petition of the Appellee, George Giovanola, as Trustee in Bankruptcy, to dismiss the petition of the Appellants.

### III.

Section 322a of the Civil Code of the State of California, under the authority of which said Code Section two of the original petitioners in the in-

voluntary petition [135] in bankruptcy based their claim, is unconstitutional insofar as it purports to allow partial subrogation, in that it infringes upon and impairs rights which had vested at the time of its enactment, and in that it is violative of the due process clauses and of the contracts and ipso facto clauses of the Constitution of the United States and the Constitution of the State of California.

If Section 322a of the Civil Code of the State of California is unconstitutional, then two of the three claims set forth in the original involuntary petition in bankruptcy are not valid claims, and the District Court therefore acquired no jurisdiction of the bankruptcy proceedings, and committed error in denying the petition of the Appellants to vacate the adjudication in bankruptcy and in granting the petition of the Appellee, George Giovanola, as Trustee in Bankruptcy, to dismiss the petition of the Appellants.

#### IV.

The District Court committed error in that it refused permission to the Appellants to introduce evidence in support of their petition to vacate the original adjudication in bankruptcy.

#### V.

The District Court committed error in entertaining and granting the motion of George Giovanola, Trustee in Bankruptcy, to dismiss the petition of the Appellants to vacate the original adjudication in bankruptcy, in that the said [136] George Giova-



nola, as Trustee in Bankruptcy, is an officer of the said District Court and has no right or standing in any proceedings challenging the jurisdiction of the said District Court, and in that such a petition to dismiss as directed by the said George Giovanola, as Trustee in Bankruptcy, to the petition of the Appellants to vacate the original adjudication in bankruptcy, is not authorized by statute or by the Federal Rules of Civil Procedure or by the Rules of the District Court of the United States, Southern District of California, Central Division.

DESIGNATION OF RECORD NECESSARY  
FOR THE CONSIDERATION OF THE  
ABOVE STATEMENT OF POINTS ON  
APPEAL.

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Respectfully submitted,

T. H. CANFIELD,

Attorney for Appellants.

Receipt of a copy of the within "Statement of Points on Appeal and Designation of Record" is hereby admitted this 21st day of August, 1939.

JOHN WILLIAM HEANEY,

FRANCIS PRICE,

A. C. POSTEL,

HAROLD A. PARMA,

By WARNER EDMONDS, JR.

Attorney for First National  
Trust and Savings Bank of  
Santa Barbara, Horace P.  
Hoefler, Peter Davidson, and  
Catherine Davidson. [138]

Receipt of a copy of the within "Statement of Points on Appeal and Designation of Record" is hereby admitted this 21st day of August, 1939.

W. P. BUTCHER,

Attorney for George Giova-  
nola, as Trustee in Bank-  
ruptcy.

[Endorsed]: Filed Aug. 22, 1939. Paul P.  
O'Brien, Clerk. [139]

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[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL FROM  
ORDER GRANTING INTERVENTION  
AND DESIGNATION OF RECORD.

J. H. McCune, Alice W. Jackson, Fred D. Jack-  
son, and Alice P. Jackson, Appellants in the matter  
of the appeal from the order of the District Court  
of the United States, Southern District of Cali-  
fornia, Central Division, granting the petition of  
Thomas J. Smitheram, E. W. Squier, and J. F.  
Goux, Appellees herein, for leave to intervene in  
said bankruptcy proceedings, respectfully submit  
the following statement of points and designation  
of the record necessary for the consideration  
thereof. [142]

## STATEMENT OF POINTS ON APPEAL

## I.

Additional creditors cannot intervene to join in an involuntary petition in bankruptcy after an involuntary adjudication in bankruptcy has been made and entered. In the instant case the involuntary adjudication in bankruptcy had been made and entered prior to the time the petitioning creditors, being the Appellees herein, filed their petition for permission to intervene. The District Court of the United States, Southern District of California, Central Division, therefore, committed error in granting the petition for leave to intervene.

## II.

The original petition in involuntary bankruptcy filed in the said bankruptcy proceedings upon which the involuntary adjudication of bankruptcy was made, was insufficient on its face to give the Court any jurisdiction in the bankruptcy proceedings, by reason of the fact that it appears from the face of such said involuntary petition in bankruptcy that two of the petitioning creditors did not have provable claims in bankruptcy. It follows, therefore, that if the District Court had not acquired any jurisdiction of the bankruptcy proceedings, it committed error in granting the petition of the intervening creditors, being the Appellees herein, for permission to intervene in said bank- [143] ruptcy proceedings.

## III.

Additional creditors cannot intervene to join in an involuntary petition in bankruptcy if the original involuntary petition is not sufficient on its face to give the Court jurisdiction to make the adjudication. If, as contended by Appellants, the original involuntary petition was insufficient to give the Court jurisdiction, then the District Court committed error in granting the petition of the intervening creditors, being the Appellees herein, for permission to intervene.

## IV.

The petition of the intervening creditors fails to state or set forth sufficient facts upon which an intervention could be granted, and fails to state sufficient facts to establish that the petitioners therein have provable claims in bankruptcy or are entitled to intervene in the bankruptcy proceedings. These points having been raised by the answer of the Appellants to the petition of the intervening creditors for leave to intervene, if the petition of such intervening creditors was not sufficient on its face, the District Court committed error in granting the petition of such intervening creditors for permission to intervene.

## V.

The issues of fact raised by the petition of the [144] intervening creditors for leave to intervene in the bankruptcy proceedings, and the answer to the petition of intervening creditors filed on behalf of the Appellants, were not determined by the District

Court, and no evidence having been offered or received in support of the petition for leave to intervene, the petition should not have been granted.

DESIGNATION OF RECORD NECESSARY  
FOR THE CONSIDERATION OF THE  
ABOVE STATEMENT OF POINTS ON  
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Respectfully submitted,

T. H. CANFIELD,

Attorney for Appellants.

Receipt of a copy of the within "Statements of Points on Appeal and Designation of Record" is hereby admitted this 21st day of August, 1939.

STANLEY TOMLINSON,

W. P. BUTCHER,

Attorneys for Thomas J.  
Smitheram, E. W. Squier,  
and J. F. Goux.

[Endorsed]: Filed Aug. 22, 1939. Paul P.  
O'Brien, Clerk. [146]

In the District Court of the United States for the  
Southern District of California, Central Divi-  
sion.

In Bankruptcy No. 31,965-C

In the Matter of

MORTGAGE SECURITIES, INC., OF SANTA  
BARBARA, a corporation,

Bankrupt.

### SUBSTITUTION OF ATTORNEYS

We hereby request that W. P. Butcher, Esq.,  
be substituted as our attorney in the place and  
stead of John William Heaney, Francis Price, A. C.  
Postel and Harold A. Parma, Esqs., in the above  
entitled action.

FIRST NATIONAL TRUST AND  
SAVINGS BANK OF  
SANTA BARBARA,

By ROBERT E. LEWIS,

Vice President.

HORACE P. HOEFER,  
PETER DAVIDSON,  
CATHERINE DAVIDSON.

We hereby consent to the above substitution.

JOHN WILLIAM HEANEY,  
FRANCIS PRICE,  
A. C. POSTEL,  
HAROLD A. PARMA,

By JOHN WILLIAM HEANEY.



I hereby accept the above substitution.

W. P. BUTCHER.

Dated: August 18, 1939. [148]

Service of the foregoing Substitution of Attorneys by receipt of a copy thereof, is hereby admitted this 24th day of August, 1939.

T. H. CANFIELD,

Attorney for Fred D. Jackson, Alice W. Jackson, Alice P. Jackson, and J. H. McCune.

[Endorsed]: Filed Aug. 25, 1939. Paul P. O'Brien, Clerk. [149]

